

(2013) 10 MAD CK 0201

In the Madras High Court

Case No : W.P. No. 18238 of 2013 and M.P. Nos. 1 to 3 of

D. Rajan Dev

APPELLANT

Vs

Government of Tamil Nadu and Another

RESPONDENT

Date of Decision : 22-10-2013

Acts Referred:

Citation : (2014) 3 MLJ 221

Hon'ble Judges : K.K. Sasidharan, J

Bench : Single Bench

Judgement

K.K. Sasidharan, J.

Introductory:

1. This is the strange case of a developer of a Residential Apartment Project constructing additional floors besides a commercial building, taking advantage of the premium F.S.I. Scheme introduced by the Government of Tamil Nadu and after completing construction, challenging the conditions of sanction order, requiring payment of premium F.S.I. Charges and that too after taking time on multiple occasions to extend the outer time limit for payment, presumably to avoid action for demolition, on account of non-compliance of the mandatory conditions of permit.

The Core Issues:

The issues that arise in this writ petition are as follows:

(A) First Issue:

Whether the builder is liable to pay the premium F.S.I. Charges to the Chennai Metropolitan Development Authority (hereinafter referred to as "C.M.D.A.") as per the guideline rate prevailing on the date of sanctioning the application for planning permission or the rate in force as on the date of application.

(B) Second Issue:

Whether sit-in-Balcony within the building line without cantilever would come within the meaning of "Balcony" thereby to make a claim for exclusion of Balcony space while computing Premium F.S.I. Charges.

A Brief Backdrop:

2. The petitioner, carrying on construction activities under the name and style of BEN Foundation, initially submitted an application for planning permission to construct a residential-cum-shopping building at Survey Nos. 223, 224 and 225, Padi Village, Padikuppam Road, Chennai. The application was processed by C.M.D.A. and by order dated 1.7.2009 approval was granted. While the construction was in progress, the Government of Tamil Nadu had introduced a Scheme called "premium F.S.I.", whereby and whereunder, the Government permitted C.M.D.A. to allow Premium F.S.I. over and above the normally allowable F.S.I.. Since petitioner was eligible to apply under Premium F.S.I., the application was submitted on 4.5.2011 before C.M.D.A. for approval of additional F.S.I. area. The officials of the second respondent inspected the site and satisfied that the construction put up by the petitioner was in accordance with the approved plan except the additional F.S.I.. Scrutiny of the application took about ten months. The Multi Storied Building Panel recommended the application submitted by the petitioner for planning permission to the Government of Tamil Nadu for approval on 30.3.2012. Thereafter, the first respondent by order dated 29.5.2012 approved the revised proposal. The C.M.D.A. calculated the amount payable by the petitioner taking into account the prevailing guideline rate. The C.M.D.A. by letter dated 2.7.2012 called upon the petitioner to remit the Premium F.S.I. charges quantified at Rs. 7,96,50,000/-. The petitioner submitted series of applications thereafter to revise the order. The petitioner wanted the C.M.D.A. to calculate the Premium F.S.I. charges taking into account the guideline rate prevailing as on the date on which the application was submitted. The representation given by the petitioner requesting refund of Premium F.S.I. charges was rejected by C.M.D.A. by order dated 19.4.2013. The letter dated 31.8.2012 and the order dated 19.4.2013 are challenged in this writ petition.

3. The Member Secretary, C.M.D.A. filed a detailed counter affidavit meeting the points raised in the affidavit filed in support of the writ petition. According to the Member Secretary, the application submitted by the petitioner for planning permission was originally granted on 1.7.2010. Thereafter, he made a revised application by availing the Premium F.S.I. scheme. The Government have approved the revised proposal based on the recommendation made by the Multi Storied Building Panel at its meeting held on 30.3.2012. Since the petitioner was liable to pay the Premium F.S.I. charges, demand notice was issued on 2.7.2012. The petitioner without remitting the charges submitted a representation dated 19.7.2012 requesting to re-check the calculation made with respect to the revised proposal relating to Premium F.S.I.. The revised proposal was examined by C.M.D.A. and a fresh demand was made on 31.8.2012 reducing the Premium F.S.I. charges by Rs. 35,10,000/- treating one of the staircases as Fire Escape

Staircase under Non-F.S.I. area. Even thereafter the petitioner has not remitted the amount. The petitioner submitted another representation on 18.12.2012. The representation was placed before the committee of Senior Officers on 5.4.2013. The Committee found that Balconies were only Sit-in-Balconies (within the building line) and as such it could not be considered as Non-F.S.I. area. After examining the issue in detail, the petitioner was advised to remit the Premium F.S.I. charges as per communication dated 31.8.2012. Thereafter, C.M.D.A. informed the petitioner by its letter dated 19.4.2013 that the representations for reduction of Premium F.S.I. charges does not merit consideration. The petitioner took time on several occasions to pay the amount. It was only thereafter he filed this writ petition.

The Argument in Summary:

4. Mr. Vijay Narayan, learned Senior Counsel for the petitioner made the following submissions:

(i) The petitioner submitted a revised application on 4.5.2011 claiming the benefits of Premium F.S.I. scheme. The application was kept pending indefinitely by C.M.D.A. By the time, the plan was sanctioned, the guideline rate was increased from Rs. 1650 per sq.ft. to Rs. 5000 per sq.ft. The petitioner is not liable to pay the Premium F.S.I. charges at the revised rate.

(ii) The relevant law for collection of Premium F.S.I. charges is the one prevailing on the date of application and not on the date of sanctioning permit and plan. The C.M.D.A. therefore erred in collecting Premium F.S.I. charges at the rate prevailing on the date of sanction instead of collecting the amount applicable as on 4.5.2011.

(iii) Annexure XVIII to the Development Regulations for Chennai Metropolitan Area contained details of spaces excluded from F.S.I. and Coverage Computation. Clause 1(9) provides that "Area of Balcony/Service Verandah to an extent of 5 percent of each dwelling unit area in case of residential buildings and 5 percent of room area in the case of hotels and lodges are excluded while computing F.S.I. and Coverage. Even though the petitioner was eligible to claim exclusion of Balcony area, C.M.D.A. erroneously denied the said benefits.

5. Mr. A. Kumar, learned Standing Counsel for C.M.D.A. made the following submissions:

(i) Even though the application was submitted on 4.5.2011, it was thereafter returned to rectify certain deficiencies. The application was re-presented on 24.2.2012. The C.M.D.A. at its meeting held on 30.3.2012 recommended the proposal for approval to the Government. The Government approved it on 29.5.2012. Therefore it cannot be said that there was undue delay in processing the application.

(ii) The guideline rate prevailing as on the date on which approval was granted alone can be taken in to account. The guideline rate prevailing as on the date on

which the application was submitted cannot be taken in view of the fact that the right to construct the additional building would accrue only after giving approval by the Government.

(iii) The petitioner even before remitting the amount, completed the construction. The petitioner took time on several occasions to remit the amount by pleading financial difficulties. It was only after completing the entire construction, he has come up with this writ petition challenging the order rejecting the request for reduction of Premium F.S.I. charges.

Discussion:

6. The petitioner is stated to be a leading builder. The petitioner wanted to develop his property in Survey Nos. 223, 224 and 225 at Padikuppam Road, Chennai. The petitioner initially submitted an application for planning permission for construction of residential-cum-shop building. The C.M.D.A. granted planning permission by order dated 1.7.2010. The Government thereafter announced the scheme in the name and style of "Premium F.S.I."

7. The Scheme relating to Premium F.S.I. reads thus:

Premium F.S.I. (DR 36)

The Authority may allow premium F.S.I. over and above the normally allowable F.S.I., in any case not exceeding 0.5 for the Special Buildings and ground developments, and not exceeding 1.0 for the multi Storied building in specific areas which may be notified, on collection of a charge at areas which may be prescribed with the approval of the Government. The amount collected shall be kept in the escrow for utilizing it for the infrastructure development in that area as may be decided by the Government.

8. The petitioner wanted to avail the benefits of the scheme launched by the Government. The petitioner submitted an application on 4.5.2011. The application was processed at various levels by C.M.D.A. The C.M.D.A. found certain material deficiencies resulting in returning the application on 10.2.2012. The petitioner was directed to resubmit the application within a period of seven days. It is a matter of record, that the petitioner failed to resubmit the application on or before 17.2.2012. The plan was resubmitted only on 24.2.2012 with a delay of seven days. Before processing the application, the petitioner should comply with all the statutory requirements including necessary clearance from the police and fire departments. Police clearance was given only on 25.2.2012. Since the petitioner complied with the requirements only during the third week of February 2012, the application after scrutiny was placed before the Multi Storied Building Panel at its meeting held on 30.3.2012. The committee resolved to recommend to the Government to sanction the revised plan. The recommendation was forwarded to the Government on 12.4.2012. It is not in dispute that along with the recommendation for approval C.M.D.A. was expected to produce all the relevant materials so as to enable the Government to take a

decision in the matter. The Government ultimately accepted the recommendation and approved the plan on 29.5.2012. Thereafter C.M.D.A. calculated the Premium F.S.I. charges taking into account the prevailing guideline rate. The C.M.D.A. issued a demand notice on 2.7.2012. The petitioner instead of paying the Premium F.S.I. charges, submitted a representation dated 19.7.2012. The C.M.D.A. received the said representation on 27.7.2012. The petitioner wanted to re-check the area of calculation made by C.M.D.A. for the revised proposal relating to Premium F.S.I. charges. The petitioner in his representation claimed approval for 14,889 sq.m. of land. C.M.D.A. found that as per the approved plan available on file, the approval was only for 14,082.26 sq.mtrs. The C.M.D.A. examined the representation submitted by the petitioner and issued a revised DC advise dated 31.8.2012. The petitioner at that point of time submitted a representation dated 18.12.2012 requesting to exclude the Balcony area while computing the F.S.I. Charges. The Committee at its meeting held on 5.4.2013 observed that as per Development Control Regulations, Sit-in Balconies(within the building line) would not be considered as Non-F.S.I. area. The Committee therefore wanted the petitioner to pay the Premium F.S.I. charges as indicated in the earlier advise dated 31.8.2012. It was only the said decision which was communicated to the petitioner on 19.4.2013.

9. (a) First issue - Applicable guideline rate

(i) There is no dispute that taking advantage of the Scheme floated by the Government, the petitioner made an application on 4.5.2011. The Premium F.S.I. was introduced for the first time in 2011. The Government have not given any guarantee or promise that all those, who apply for Premium F.S.I. would be granted approval forthwith without examining their eligibility. The application submitted by the petitioner on 4.5.2011 was considered by C.M.D.A. at various levels. It was not the only one application. C.M.D.A. is a body entrusted with the task of examination and approval of building applications throughout the planning area. The application after scrutiny was returned on 10.2.2012. The petitioner re-submitted it on 24.2.2012. The C.M.D.A. thereafter placed the application before the Committee on 30.3.2012. The Committee forwarded the application with recommendation to the Government for approval. The Government is the ultimate authority to grant permission. The application was required to be considered by the Government in the light of the prevailing building Rules. The Government considered the recommendation made by C.M.D.A. and by proceedings dated 29.5.2012 granted approval. The C.M.D.A. wanted the petitioner to pay the Premium F.S.I. charges by calculating the guideline rate prevailing as on the date on which approval was granted by the Government.

(ii) The petitioner has no vested right to claim approval of his revised application, on the basis of Premium F.S.I. Scheme. The guideline rate applicable as on the date on which approval was granted by the Government alone would apply in a case of this nature. There is no statutory requirement under the Development

Control Rules to dispose of the matter before a particular date or a deemed approval on account of the delay in finalising the proposal. In fact, there was no undue delay on the part of C.M.D.A. or Government. The application was processed at various levels and it was sent to the departments like police, fire, etc. for clearance. It is a matter of record that the petitioner obtained the final clearance only on 25.2.2012 and within a period of one month the application was placed before the meeting. Therefore, it cannot be said that there was undue delay on the part of the Government to consider the application for approval.

Judicial decisions:

(iii) The Supreme Court in *Usman Gani J. Khatri of Bombay and Others Vs. Cantonment Board and others*, held that the builder would not acquire any legal right by submitting the building plan. The Supreme Court observed:

The petitioners did not acquire any legal right in respect of building plans until the same were sanctioned in their favour after having paid the total amount of conversion charges in lump sum or in terms of sanctioned instalments and getting conversion of their land in freehold tenure.

(iv) The Supreme Court in *Usman Gani J. Khatri of Bombay v. Cantonment Board* (supra) in order to explain the unsustainability of the claim made by the builders solely on account of submission of plan indicated a reverse case.

If we consider a reverse case where building regulations are amended more favourably to the builders before sanctioning of building plans already submitted, the builders would certainly claim and get the advantage of the regulations amended to their benefit.

(v) The Supreme Court in *State of W.B. Vs. Terra Firma Investment and Trading Pvt. Ltd.*, reiterated the legal position in the following words:

14. ...By mere submission of a plan for construction of a building which has not been passed by the competent authority, no right accrues. The learned Judges of the High Court should have examined this aspect of the matter as to what right the respondent had acquired by submission of the plan for construction of the high-rise building before its application was rejected by a statutory provision.

(vi) The question as to whether a vested right would accrue to a builder on account of submission of application for approval of building plan and as to whether new building regulations framed by the Government which came into force subsequently would apply to such application came up for consideration again before the Supreme Court in *Howrah Municipal Corpn. and Others Vs. Ganges Rope Co. Ltd. and Others*, . The Supreme Court found that the Act does not contain a provision for deemed sanction. Before the Supreme Court the builder contended that sanction has to be granted on the basis of the Building Rules prevailing on the date of submission of application for sanction. The Supreme Court reiterated the legal position enunciated in *Usman Gani J. Khatri*

of *Bombay v. Cantonment Board* (supra) that builders do not acquire any legal right until the plan is sanctioned. The Supreme Court found that the High Court directed disposal of the application for planning permission before a particular period and it was only after the expiry of the said period, revised Regulations came into force. Even then the Supreme Court negated the contention taken by the builder. The Supreme Court held:

36. The above stated legal position is not disputed on behalf of the respondent Company. What is being contended is that the order of the High Court fixing a period for the Corporation to decide its pending application for sanction creates a vested right in favour of the applicant Company to seek sanction for its additional proposed construction on the basis of the Building Rules, as they stood prior to the amendment introduced to the Building Rules and the consequent resolution of the Corporation restricting the thereunder, restrictions imposed on heights of buildings on specified wards, roads and localities would apply to all pending applications for sanction. The question is whether any exception can be made to the case of the applicant seeking sanction who had approached the Court and obtained consideration of its applications for sanction within a specified period. We have extracted above the various orders passed by the High Court in writ petitions successively filed by the Company in an effort to obtain early sanction for its additional construction of three floors on the buildings in its multi-storeyed complex already completed up to the fourth floor. In none of the orders of the High Court, there is a mandate issued to the Corporation to grant a sanction. What was directed by the High Court in the first order was merely a "liberty" or option to the Company to seek sanction for additional three floors. In the subsequent order, an "expectation" was expressed for decision of the pending applications within a period of four weeks. There was, thus, in favour of the Company an order of the High Court directing the Corporation to decide its pending applications for sanction within the allotted period but non-compliance therewith by the Corporation cannot result in creation of any vested right in favour of the Company to obtain sanction on the basis of the Building Rules as they stood on the date of making application for sanction and regardless of the amendment introduced to the Building Rules. Neither the provisions of the Act nor general law creates any vested right, as claimed by the applicant Company for grant of sanction or for consideration of its application for grant of sanction on the then existing Building Rules as were applicable on the date of application. Conceding or accepting such a so-called vested right of seeking sanction on the basis of the unamended Building Rules, as in force on the date of application for sanction, would militate against the very scheme of the Act contained in Chapter XII and the Building Rules which intend to regulate the building activities in a local area for general public interest and convenience. It may be that the Corporation did not adhere to the time-limit fixed by the Court for deciding the pending applications of the Company but we have no manner of doubt that the Building Rules with prohibition or restrictions on construction activities as applicable on the date of grant or refusal of sanction would govern the subject-

matter and not the Building Rules as they existed on the date of application for sanction. No discrimination can be made between a party which had approached the Court for consideration of its application for sanction and obtained orders for decision of its application within a specified time and other applicants whose applications are pending without any intervention or order of the Court.

37. The argument advanced on the basis of so-called creation of vested right for obtaining sanction on the basis of the Building Rules (unamended) as they were on the date of submission of the application and the order of the High Court fixing a period for decision of the same, is misconceived.

(vii) The petitioner now wanted the guideline rate of the land as on 4.5.2011 to be taken for the purpose of fixing the Premium F.S.I. charges. The Government have taken the guideline rate which was prevailing as on 29.5.2012. In case the guideline rate is reduced after submission of building plan and a reduced rate was prevailing as on the date of approval, the petitioner would claim the benefits of new guideline rate and would not agree for the old rate. The very same yardstick has to be applied here. When it is made out that the guideline rate was increased during the pendency of application for building permit, necessarily the rate applicable as on the date on which the building plan was sanctioned alone should be paid.

(viii) The petitioner has given the revised application for building plan under Regulation 36. The application has to be processed by C.M.D.A. The process would complete only after granting approval by Government. The Regulation very clearly provided that the premium F.S.I. shall be allowed in specific areas with the approval of Government. The approval of Government is therefore mandatory. It is only when the Court grants approval, a right would accrue and not before. The date of approval is therefore the crucial date. The guideline rate as on the date on which approval was granted alone is applicable.

(b) Second issue:

Exclusion of Balcony Area - Features of Balcony:

(i) The petitioner has made a claim that while computing the total area, the balcony space should be deducted. "Balcony" is defined as a cantilever projection, with a handrail or balustrade or a parapet, to serve as sitting out place. The Balcony in the case of the petitioner is a sit-in-balcony inside the building without any kind of projection. Such a balcony would not qualify for exclusion from F.S.I. and coverage computation. Regulation 2(7) is very clear that such sit-in balcony (within the building line) would not be treated as balcony qualified for exemption from computation of F.S.I. and Coverage.

(ii) Balcony constructed within the building line would remain part and parcel of the original structure which is otherwise called Basic Structure. There is no projection involved in such construction. The building line would remain as it is. The concept of balcony involves a cantilever projection to serve as sitting out

place. The definition of balcony is very clear. The plan prepared by the petitioner and available on record clearly shows that it was a sit in balcony without any projection outside. The balcony is found part of the original structure and within the building line. The C.M.D.A. therefore was correct in overruling the contention taken up by the petitioner with regard to exclusion of area of balcony while computing the constructed area for fixing the premium F.S.I. Area and related charges.

10. The petitioner has taken the C.M.D.A. for a ride. C.M.D.A. by order dated 2.7.2012 called upon the petitioner to pay Premium F.S.I. Charges. The petitioner immediately filed a revised proposal on 19.7.2012. It was not on the ground of excess F.S.I. charges or collection of guideline rate as on the date of approval. It was only on account of the difference in area. The C.M.D.A. vide letter dated 31.8.2012 again called upon the petitioner to pay Premium F.S.I. charges. The petitioner thereafter submitted another representation on 14.12.2012 to reduce the premium F.S.I. charges by excluding the balcony area. The application was considered by C.M.D.A. at its meeting held on 25.2.2013. The C.M.D.A. thereafter called upon the petitioner to pay the entire amount as per demand note. The petitioner by representation dated 14.5.2013 sought time upto 15.7.2013, to make payment. The C.M.D.A. by letter dated 19.6.2013 granted time upto 15.7.2013 to pay Premium F.S.I. Charges. It is a matter of record that only thereafter the petitioner has filed this writ petition challenging the very levy of Premium F.S.I. Charges.

11. The petitioner has taken up a contention that he is not liable to pay the guideline rate as on the date on which approval was granted by the Government. It is also a matter of record that the petitioner has completed the construction even before the approval of revised plan under Regulation 36. Legally the petitioner is entitled to put up additional construction only after complying with the conditions incorporated in the order of approval which includes payment of premium F.S.I. charges. The petitioner having completed the construction of additional floors and commercial building is bound to pay the Premium F.S.I. charges. It is not open to him to accept one part of the order and reject the one unfavourable to him.

Summary of Conclusions:

12. The following are my findings with respect to the two issues raised in this writ petition.

(i) The builder would not acquire any right by submitting application for building plan. The right would accrue only after the approval of plan. Therefore the builder is liable to pay the development charges on the basis of the prevailing rate on the date of approval.

(ii) Balcony within the meaning of Regulation 2(7) of Development Regulations for Chennai Metropolitan Area alone would qualify for exclusion of space for computation of Premium F.S.I. and Coverage. Sit-in-balcony without cantilever

projection within the building line would not come within the purview of "balcony".

Disposition:

For the reasons I have given, I would dismiss this writ petition without costs. Consequently, the connected M.P. is closed.