

(2023) 02 BOM CK 0001
In the Bombay High Court
Case No : Writ Petition No. 64 Of 2022

Sunil

APPELLANT

Vs

State Of Maharashtra And Others

RESPONDENT

Date of Decision : 01-02-2023

Acts Referred:

Maharashtra Land Revenue Code, 1966 — Section 37A, 37A(i), 37A(ii), 37A(1), 37A(2)

Citation : (2023) 02 BOM CK 0001

Hon'ble Judges : A.S. Chandurkar, J; Anil L. Pansare, J

Bench : Division Bench

Advocate : M.G.Bhangde, S.S. Sarda, N.P Mehta

Final Decision : Partly Allowed.

Judgement

Anil L.Pansare, J

1. Rule. Rule is made returnable forthwith. Heard finally with the consent of the parties.

2. The Petitioner has put forth the following substantive prayer:-

“(i) Quash and set aside the impugned demand dated 15.01.2021 (Annexure-7) and communication dated 11.11.2021 (Annexure-12) issued by the Respondent No.3 and hold and declare that no development charges are recoverable from the Petitioner.”

3. By the impugned communication, the Respondent No.3 – Nazul Tahildar, raised a demand for a sum of Rs. 34,05, 806/- in order to grant No Objection Certificate ('NOC' in short) to sell the flats developed by the Petitioner, on the premise that the same has been done by using Transfer of Development Rights ('TDR' in short) in a multi-storied building by name and style as "La Regalia" constructed on nazul Plot No.94 admeasuring 1114.8 sq.mts. in Mouza Lendra, Ramdaspath, Nagpur.

4. The Petitioner states that he is the owner of the said plot. He entered into an

agreement of development with M/s. Raghav Life Spaces, through its partner, Sharad Mor on 22nd July, 2015. The Petitioner has also executed power of attorney in favour of Mr. Mor on the same day. The parties decided to develop a multi storied residential building on the said plot in accordance with law. Since the said plot is/ was on nazul lease, the Petitioner applied to the Respondents vide application dated 18th January, 2016 for grant of NOC for the proposed construction of multi-storied residential building by using Floor Space Index ('FSI' in short) and TDR. The Petitioner on 18th January, 2016 had also applied to the Nagpur Municipal Corporation (NMC) for sanction of the building plan. The NMC was pleased to sanction the building plan and issued commencement certificate on 7th May, 2016. The Respondents also granted NOC on 25th January, 2017 for construction of a multi-storied building.

5. The Petitioner states that after completion of construction, the Petitioner wanted to execute deed of conveyance in favour of the flat purchasers. The Petitioner therefore required NOC for transfer/ sale of the flats from the Respondents. Accordingly, the Petitioner applied to the Respondents on 25th June, 2020 and 12th November 2020 for grant of NOC for sale of flats.

6. The Petitioner further states that the Respondents vide impugned communication (Annexure 7) raised a demand of Rs.34,05,806/- as development charges. The Petitioner states that the said demand is without authority of law and has been raised at ipse dixit of Respondent No.2-Collector. The Petitioner, therefore, addressed a representation to the Collector to provide Government Resolution or any other decision on the basis of which the impugned demand has been raised. Despite the representation, the Respondents have neither recalled demand nor supplied the required information or any justification.

7. The Petitioner, however, came across a Government Resolution ('GR' in short) dated 13th April, 2017 which was amended by GR dated 23rd February, 2018 which mentions about levy of development charges. However, according to the Petitioner, the same are not applicable to his case. Accordingly, the Petitioner by way of another representation expressed that the GR dated 23rd February, 2018 is not applicable to his case and requested to recall the demand notice dated 15.01.2021. The Respondent No.2, however, issued the impugned communication (Annexure-12) dated 11th November, 2021 reiterating the demand for the development charges, with a caution that non-payment of said charges would result into rejection of Petitioner's application seeking NOC. Hence the present Petition.

8. The Respondents state that as per the Government Gazette notification issued by the Revenue and Forest Department on 4th January, 2017, it is provided that any newly amended provisions of Section 37A (i) & (ii) in the Maharashtra Land Revenue Code ('Code of 1966' in short), the concerned Collector shall exercise his powers for grant of permission in respect of nazul land regarding FSI/TDR. According to Respondents, considering the aforesaid notification coupled with amended provisions of Section 37A, the Respondents have accorded permission

to the Petitioner vide order dated 25th January, 2017 (Annexure-4) granting additional TDR and permission for construction thereon for residential purpose with certain conditions. The condition No.10 stipulates that if the Government issues order in reference to the said subject in future, those orders shall be binding upon the Petitioner and as per condition No.11, the said permission was made subject to the payment of Nazrana fees or unearned income in this regard.

9. It is the say of the Respondents that on 13th April 2017, the Government issued another Resolution having regard to the Section 37A of Code of 1966 declaring the policy in respect of development/ reconstruction on the land given on lease and further provided that while granting such permission for re-development or re-construction, it will be necessary to charge 25% premium as per prevailing market value of residential/ commercial/ industrial use of the land. The Respondents have then placed reliance upon another GR dated 23rd February, 2018 issued by the Revenue and Forest Department whereby the rates stated in the previous GR dated 13th April, 2017 were revised from 25% to 5%.

10. Ms. N.P. Mehta, learned AGP submits that in terms of the GR dated 23rd February, 2018, the Respondent No.2 obtained prevalent market rates for residential use of the land for the year 2018, which comes to Rs. 61,100/- per sq.mts. Accordingly, the amount of premium was calculated by multiplying the area of the plot admeasuring 1114.83 sq.mts. and by charging 5% premium which comes to Rs. 34,05,806/-and requested the Petitioner to pay the same for granting NOC for transfer of the flats. Accordingly, the amount of development charges is said to be justified by the Respondents.

11. Mr. M.G. Bhangde, the learned Senior Advocate has taken us through the aforesaid documents and provisions u/s 37A of the Code of 1966 to contend that the permission has been granted on 25th January, 2017. At that time, there was no authority vested with the Respondents to raise development charges. The first such GR that permits demand for development charges is dated 13th April, 2017. In the circumstances, Condition Nos. 10 and 11 could not have been invoked by the Respondents to raise the demand taking aid of the GR that was not in existence when the permission was granted. He has invited our attention to Section 37A under which the GR dated 13th April,2017 and 23rd February 2018 have been said to be issued. Section 37A of the Code of 1966 reads thus :

"37A. Restrictions on sale, transfer, redevelopment, change of use, etc. in relation to Government land and nazul land:

(1) Every sale, transfer, redevelopment, use of additional Floor Space Index (FSI), transfer of Transferable Development Rights (TDR) or change of use of any Government land in Amravati and Nagpur Revenue Divisions including the Mumbai City and Revenue Divisions in the State, which is granted for various purposes under the provisions of this Code or rules made thereunder or any law relating to land revenue, before the commencement of this Code, including the nazul lands in Amravati and Nagpur Revenue Divisions shall be subject to taking

the prior permission of the State Government.

(2) The State Government shall, while granting such permission as required under sub-section (1), recover such premium or charge and share of unearned income subject to such terms and conditions as may be specified, by general or special order, issued by the Government, from time to time :

Provided that, if the provisions of this section or of any such orders issued thereunder are inconsistent with the terms and conditions of the order of land grant or the lease deed executed prior to the commencement of the Maharashtra Land Revenue Code (second Amendment) Act, 2012, the terms and conditions of such order of land grant or lease deed shall prevail:

Provided further that, a case of nazul lands in Amravati and Nagpur Revenue Divisions, the Provisions of sub-section (1) shall not be applicable with retrospective effect.

Explanation – for the purpose of this section, -

(a) "Government land" includes the Government land or part of such land or building erected on such land or part thereof or any right or any benefit arising out of or share in relation to such land or building or part of such land or building ;

(b) "nazul land" means the type of Government land used for non-agricultural purpose such as building, road, market, playground or any other public purpose or the nazul land which has potential for such use in future including such lands granted on long or short term lease or on no compensation agreement."

12. Learned Senior Advocate contends that sub-clause (1) provides for seeking prior permission of the State Government in respect of sale/transfer, re-development, use of additional FSI, TDR etc. for the lands including nazul land. The State Government has delegated these powers to the Collector (respondent No.2). He has then referred to sub-clause (2) to contend that the State Government (Collector) while granting permission as required under sub-clause (1) has to recover such premium or charge and share of unearned income by general or special order. Thus, it is argued that the development charge, if any, ought to have been levied while granting permission to develop the property. In the present case, the Respondents have not raised the demand when the permission was granted, as there was no authority vested with the Government at the relevant time to raise such a demand. The authority, if any, came into existence for the first time vide GR dated 13th April,2017. Thus, it is argued that the demand raised is without authority of law.

13. Ms. Mehta, learned AGP, on the other hand, has referred to the renewal lease dated 12th September, 2016 executed in favour of the Petitioner. Our attention is invited to condition No.2 which states that the lessee shall from time to time and at all times during the said term pay and discharge all rates, taxes, charges and assessments of every description which are now or may at any time hereafter

during the said term to be assessed, charged or imposed upon the said land and or the building to be erected thereupon. She contends that the Petitioner has signed the lease deed with open eyes. He was aware of the fact that the charges could be imposed in future as well. The permission was granted subject to Condition Nos. 10 and 11 which provided that the future orders of the Government will be binding upon the Petitioner and that the permission is subject to payment of nazrana fees or charge or share of unearned income in this regard. She further contends by referring to Section 37A of the Code of 1966 that the authority to raise demand for development charge did exist with the State Government. It is a different matter that the rates of development charge were not prescribed. The learned AGP accordingly contends that the provision was in existence and, therefore, the Respondent No.2 had authority to raise demand in terms of Section 37A of the Code of 1966.

14. We have given our thoughtful consideration to the submissions made by both the sides. Sub-sec.(1) of Section 37A provides for taking prior permission of the State Government for redevelopment of the land or for transfer of TDR or for change of use of the land including nazul land. The Petitioner has on 18th January, 2016 sought permission/approval to the building plan for construction of a multi-storied building as also the NOC. Thus, it appears that necessary permission was sought by the Petitioner in terms of Sub-sec.(1) of Section 37A. The Sub-sec.(2) of Section 37A deals with granting permission. It provides that while granting such permission, the State Government shall recover the premium or charge and share of unearned income subject to the terms and conditions as are specified by general or special order issued by the Government. On a perusal of sub-sec.(2), it appears that the premium or charge is to be recovered while granting permission. The recovery could be subject to appropriate terms and conditions which are specified in the orders issued by the Government.

15. There is no dispute that the permission to construct multi-storied building by using FSI and TDR was granted by the Collector vide communication dated 25th January, 2017 with certain conditions. The condition No.10 stipulates that if the Government issues order in reference to the subject-matter in future, those orders shall be binding upon the Petitioner and Condition No.11 provides that the permission was subject to payment of nazrana fees or unearned income in this regard. The question that requires answer is, whether Condition Nos. 10 and 11 empowers the Respondents to raise impugned demand. The answer, in our view, is in the negative for the reasons enumerated herein-below.

16. A careful reading of sub-sec.(2) of Section 37A would show that while granting permission as required under sub-sec.(1) of Section 37A, the amount of premium or charge has to be determined. It is so because sub-sec.(2) unequivocally provides for recovery of premium or charge while granting permission. The amount could be recovered only if it is ascertained. The use of the term 'shall recover such premium or charge' in sub-sec.(2) clearly indicates that amount of premium or charge has to be ascertained while granting

permission. The later part of sub-sec.(2) would then indicate that such ascertained premium or charge will be recovered subject to such terms and conditions as specified in the Government order. In our view, the ascertainment of the amount cannot be made subject to terms and conditions specified in the order.

17. The learned AGP has harped upon the conditions of the renewal of lease. The lease was renewed subject to the conditions, inter alia, that the lessee shall pay from time to time and at all times during said term of lease, all rates, taxes, charges etc. which may be assessed in future. In our view, this condition shall only bind the lessee to pay taxes or charges that have been assessed or would be assessed in future in respect of the development of land or building to be erected thereupon. This condition concurs with assessment of taxes, charges etc. as provided u/s 37A of the Code of 1966. What Section 37A provides is that the development of the land shall be subject to prior permission of the State Government and that while granting permission, the State Government shall recover the amount of premium, taxes, charges etc. In other words, when the lessee of nazul land in future, intends to develop the land, say by constructing multi-storied building, he will have to pay premium or development charges as demanded by the State Government while granting permission and the condition No.2 binds lessee to pay such premium or charge. The Petitioner is thus committed to pay the charges as assessed by the Respondents while granting permission to use FSI and TDR, but then the premium or charges has to be assessed while granting permission. In that sense, neither the conditions of renewal of lease nor the provisions of the Code of 1966 empowers the Respondents to grant permission without assessing the premium or development charges. The provision also does not empower the Respondents to grant permission subject to condition of assessing charge in future. To recover the amount, the Collector is under obligation to determine of the same first.

18. The learned AGP has referred to GRs dated 13th April 2017 and 23rd February, 2018, to contend that the demand has been raised in terms of the provisions of the aforesaid GRs. The first GR provided for the charges @ 25% of the prevailing market value of the residential use of land, which was reduced to 5% by the subsequent GR. It has been argued that sub-sec.(2) of Section 37A provides for recovery of the premium or charge as specified by general or special order issued by the Government. According to the learned AGP, the orders have been issued by the Government through the said two GRs. Learned Senior Advocate, however, has rightly pointed out that, though the Government had authority to levy charge/premium in terms of Sec.37A, the said authority was subject to the issuance of general or special order. The order came into existence for the first time through the GR dated 13th April,2017. The permission to use the FSI and TDR, however, was granted prior thereto i.e. on 25th January, 2017. Thus, it is argued that though there existed provision to levy charge at the time when the permission was granted, the rate of assessment was prescribed on 13th April, 2017. In the circumstances and in absence of the rate of assessment

of charge, the Respondents could not have levied the charge prior to 13th April, 2017. He is further correct in contending that the retrospective levy of charges by way of subordinate legislation is impossible unless expressly authorized by the statute.

19. In support, learned senior Advocate has invited our attention to the judgment, in the case of Federation of Indian Mineral Industries and others vs. Union of India, reported in (2017) 16 SCC 186. The case before the Hon'ble Supreme Court was in respect of the provisions of Mines and Minerals (Development & Regulation) Act, 1957. On 12th January, 2015, the President promulgated the Ordinance and on 27th March 2015, the Ordinance was replaced by the Mines and Minerals (Development and Regulation) Amendment Act, 2015 with effect from 12th January, 2015. Under the provisions of the Act, the State Governments were required to establish District Mineral Foundations ('DMF' in short). On 16th January, 2015 the Central Government issued a direction to all the State Governments that the notification establishing the DMF should state that the DMF would be deemed to have come into existence with effect from 12th January, 2015. Subsequently, the State Government issued notifications establishing DMFs. The Mines and Minerals Rules of 2015 provided for contributions to the DMF from their deemed date of establishment i.e. from 12th January, 2015. The validity of the notification was challenged before the Hon'ble Supreme Court. The Supreme Court held that in view of the failure of the Central Government to prescribe on 12th January 2015 the rate at which contributions are required to be made to the DMF, the contributions to the DMF could not be insisted upon with effect from 12th January, 2015. The Court further held that the rate at which the tax is to be imposed is an essential component of the tax and where the rate is not stipulated or which cannot be applied precisely, a person cannot be taxed. It is also observed that the delegated legislation is ordinarily prospective in nature and a right or liability created for the first time cannot be given retrospective effect. Accordingly, it is held that though the notification provides that contribution is payable from 12th January, 2015, it would be payable only from the date of the notification i.e. 17th September, 2015 even though the DMF was established or deemed to be established with effect from 12th January, 2015.

20. The law laid down by the Apex Court would support the case of the Petitioner on the point that though there existed a provision in the statute to levy development charges, the authority to do so was in slumber till April, 2017. The rates having been prescribed for the first time in April 2017 the authority to levy development charges came into existence on that day. In that sense, the demand raised by the Respondents vide impugned order is unsustainable in law.

21. The learned Senior Advocate, in response to the conditions of renewal of lease, more particularly Condition No.2, which has been relied upon by the Respondents to contend that the lease was renewed subject to the condition that lessee shall pay the rates, taxes, charges etc. that will be levied in future, has

relied upon the judgment in the case of Bhagwant Rai and Others vs. State of Punjab and Others, reported in (1995) 5 SCC 440. The question involved was in respect of property tax. The statute provided for assessment of property tax on the basis of standard rent expected to be received under the relevant Rent Act and not actual rent received by the landlord from the tenant. The authority therein had assessed the property tax on the basis of the actual rent received by the appellants therein. The case of the State authority was that the landlord/appellant had agreed/ admitted that the tax was to be paid on the basis of actual rent received. The Hon'ble Supreme Court has held that admission wrongly made by the landlord that he was prepared to pay the tax on the basis of the actual rent cannot estop him from questioning the assessment made by the authority on the basis of actual rent and cannot be a ground of denying him the statutory benefits as there can be no estoppel against the statute.

22. We have already expressed our views on the aforesaid condition so much so, we have said that it permits the authority to impose tax or charges in future but then that imposition cannot be vague and cannot be made subject to further conditions. The assessment of the tax/charge has to be certain although recovery thereof could be made subject to the conditions as specified in the order issued by the Government. Nonetheless, the judgment relied upon by the learned Senior Advocate would be advantageous to the extent that even if it is presumed that the Petitioner has agreed to pay the taxes as will be levied in future, he is entitled to challenge the assessment in terms of the provisions of the Statute. The challenge to the condition No.2 of the lease, in the present case, would sustain accordingly.

23. Similar such view was taken by the Hon'ble Supreme Court in the case of Shridhar C. Shetty vs. Additional Collector & Competent Authority and others, reported in (2020) 9 SCC 537 . The Apex Court while dealing with the tenancy and land laws held that any undertaking given by the party concerned cannot expand the statutory jurisdiction of the authority concerned.

24. Considering the provisions of Section 37A of the Code of 1966 read with the judicial pronouncements cited by the Petitioner, we are of the considered view that the Respondents could not have demanded development charges at a belated stage by taking aid of GRs dated 13th April, 2017 and 23rd February, 2018. The impugned demand dated 15th January, 2021 and the communication dated 11th November, 2021 are therefore liable to be quashed and set aside.

25. The Petitioner, however, is also seeking a declaration that no development charges are recoverable from him. On this count, we can only say that if there existed the prescribed rate to raise demand as development charges on the date when the permission was granted to the Petitioner to construct multi-storied building, the Respondents are at liberty to demand such development charges as were existing. Hence, the following order:

ORDER:

(i) The Writ Petition is partly allowed.

(ii) The impugned demand dated 15th January, 2021 (Annexure-7) and the communication dated 11th December, 2021 (Annexure-12) issued by the Respondent No.3, are quashed and set aside.

Rule made absolute in the aforesaid terms. No costs.