

(2006) 10 BOM CK 0010

In the Bombay High Court

Case No : Writ Petition No. 1730 of 2005

Tulsiram Rangwala Trust, Rikhiram T. Arora and Shivram
Enterprises (India) Pvt. Ltd.

APPELLANT

Vs

The Collector and District Magistrate, The Additional
Commissioner Konkan Division, The Principal Secretary and
Officer on Special Duty (Appeals), Revenue and Forest
Department and State of Maharashtra

RESPONDENT

Date of Decision : 18-10-2006

Acts Referred:

Development Control Rules, 1966 — Rule 8(2)
Maharashtra Land Revenue Code, 1966 — Section 247, 248, 267

Citation : (2007) 1 ALLMR 9 : (2007) 1 BomCR 122 : (2007) 1 MhLj 561

Hon'ble Judges : Anoop V. Mohta, J

Bench : Single Bench

Advocate : S.U. Kamdar and N.F. Dhillia, instructed by Hariani and Co, for the
Appellant; S.K. Nair, AGP for respondents 1, 2 and 4, for the Respondent

Judgement

Anoop V. Mohta, J.—The petitioners have challenged the demand notice and the order of confirmation of the said demand passed by the respondents-authorities in respect of the property being Plot No. 216, BBR Block No. 2, Shalimar, Marine Drive, Mumbai having area of 1300 sq.ft. (the premises) on the foundation that the petitioners have changed the use of the said premises without prior permission from the office of the Collector, Mumbai City District.

2. The Government leased out the said premises to one Shri Irani in the year 1939 for 99 years. The lease rent initially fixed was Rs. 7442/-per year for first four years and thereafter Rs. 9922/-per year. The building on the said plot consists of ground plus five floors. The plot and the building called "Shalimar" was acquired by Shri Nathumal in the year 1942 for Rs. 3,50,000/-. The leasehold rights thereafter vested in his son Shri Tulsiram Nathumal, who in turn assigned his rights to the present petitioner No. 1-Tulsiram Rangwala Trust with some restrictive clauses. On 15.8.1999 a Sony Show Room was housed in the

said premises which is in occupation of petitioner No. 3. For more than 40 years, the said premises were in use as business premises by other petitioners. There are various premises in the area which are in use for offices, hotels, booking offices, Show Rooms and Shops some of the names are Kishco Show Room, Cyber City Show Room, Manganlal Dresswala etc.

3. On 26.2.2001 the office of the Collector, Mumbai called upon the petitioners to show cause as to why the necessary action should not be taken for breach of conditions of lease deed in respect of the Shalimar building. The same was replied by petitioner No. 2 on 2nd May 2001. The hearing took place on 21st July, 2001. Inspection of the premises carried out on 23rd August, 2001. On 15th November, 2002, the petitioners received a demand notice dated 16th October, 2002 for payment of Rs. 71.66 lacs (inclusive of penalty) in the year 1999 and Rs. 71.66 lacs per year as a lease rent for the year 2000-2001 for change of user of the said premises without permission.

4. A review petition was filed before first respondent which was heard on 29th January, 2003. Based on the written arguments on 26th February, 2003, respondent No. 1 passed the order fixing enhanced lease rent of Rs. 14,77,889/- per year and further held that the lease rent was payable for the year 1999 to 2003. and thereby demanded total sum of Rs. 72,89,445/- as due and payable.

5. The petitioners, therefore, preferred an Appeal u/s 247 of the Maharashtra Land Revenue Code, 1966 (Maharashtra Revenue Code) before the Additional Commissioner, Konkan Division, Mumbai. The said appeal was dismissed on 22nd October, 2003. Another appeal u/s 248 of the Maharashtra Revenue Code was preferred by the petitioner. Pending the said appeal, respondent No. 1 issued notice of attachment dated 20th March, 2004 for non-payment of the said amount. The property was attached by the respondents u/s 267 of the Maharashtra Revenue Code. By order dated 25th March, 2004 in Writ Petition No. 2910/2004 filed by the petitioners, the High Court was pleased to accept the undertaking through the affidavit filed by the petitioners 1 and 3 and on payment of Rs. 5 lacs directed the respondent No. 1 to remove the seal and further directed the respondents to decide the appeal in accordance with law. The petitioners had filed before the concerned authorities various other orders passed in favour of the similarly situated premises of the area and also made submissions relying on the Government Resolution dated 23.11.2001.

6. On 23rd June, 2005 by the impugned order, respondent No. 3 has confirmed the order passed by the respondent No. 1 dated 26th February, 2003 and 20th October, 2003 passed by the Additional Commissioner. The petitioners therefore have preferred the present writ petition some time in June, 2005.

7. By order dated 26th July, 2005 the Bombay High Court has directed to appoint Commissioner and to submit the report in respect of the total FSI consumed and what is the FSI consumed for the Show Room in question. The said report is now part of the record dated 18th August, 2005. As per the said report, the FSI

utilised is 2.86 of the building in question. It is also reported that FSI utilised of ground floor premises (admeasuring 1340 sq.ft. of carpet area) occupied by Sony World in the Shalimar building on 216, Mumbai is 0.084.

8. All the authorities of respondents 1 to 3 have concurrently maintained the demand on the ground of change of user without permission by the petitioners. The basic foundation for the said demand is the Government Resolution dated 14th June, 1988 which relates to increased rate of ground rent to be charged for granting permission for use of a portion of the building on Government land allotted for some specific purpose and/or some other beneficial purpose. The relevant clauses of the said Resolution being Clauses (a), (b), (c) and (d) are reproduce below:

(a) In a case where Government plot has been sanctioned for a specific purpose and if permission is sought from the Government for use of a portion of the building on such a plot for a more beneficial purpose, maximum per cent of the total construction area of the building be permitted to be used for a purpose permissible under the Development Rules of the Municipal Corporation of Greater Mumbai (or any other local Municipal Corporation/ Municipal Council) or Planning Authority or Special Planning Authority.

(b) At the time of granting such a permission for change of user, the lessee should be charged full amount of the lease rent at the rate charged for the original purpose and apart from it, in respect of the land which would have been conceptually required for the portion of the building, on the basis of permissible floor space index at the time of construction to be used for a more beneficial purpose, the increase in lease rent should be charged at the market rate prevailing at the time of such a change of user.

(c) In respect of the area to be used for a more beneficial purpose, the amount of lease rent should be revised every fifteen years.

(d) In case where a Government plot has been sanctioned with possessory rights, if a permission is to be granted for use of a portion of the building on such a plot of land for more beneficial purpose, licence fee as under should be charged:

On the basis of permissible Floor Space Index at the time of construction of the building, in respect of the land which would have been conceptually required for construction of the portion which is to be used for a more beneficial purpose, at the time of change of user the licence fee should be charged at the prevailing rate of lease rent on the basis of prevailing market rate. The rate of this licence fee should be revised every fifteen years.

9. Another Government circular dated 23.11.2001 regarding the sale/transfer of premises/flats under Industrial and commercial user in the building on the land sanctioned by the Government for Industrial and commercial purposes has been strongly relied upon by Mr. S.U. Kamdar, the learned Counsel for the petitioners

and contended that in the facts and circumstances of the case, the demand of lease money as claimed is contrary to the law and illegal as it was based on 1988 circular. He has contended that his case is governed by the circular dated 23.11.2001. He has further challenged the demand based on existing FSI 1.33 as claimed in view of Clauses (b) and (d) of the 1988 circular. He has contended that based on 1988 circular itself, the FSI should have been 2.45 as per the Building Regulation Rules, the existing FSI as taken note of while arrived at the demand was therefore bad as the respondents themselves in other cases specially of Kishco Cutlery and others have taken the FSI of 2.46 based on the old BCR Rules, 1966.

10. The counsel for the petitioners has further contended that in view of the Resolution dated 23.11.2001 the respondents ought to have demanded the lease amount at the commercial rate as the Government Resolution dated 23.11.2001 is applicable with effect from 9.7.1999 and as the premises has been used as a Show Room by Sony World since August, 1999, the respondents should have decided the case in accordance with this policy. He has strongly relied on Clauses 1, 2, 3, 4, 5 and 9 in support of his submissions which are reproduced below:

1. At the time of granting permission for sale/transfer of the premises in the building, transfer fee/license fee as under should be charged.

Sr. Place/Area Per Sq.ft.rate of sale/ No. transfer fee (In Rs.) Industrial Commercial 1. Mumbai City Dist. 1,000 1,500 District and Mumbai Suburban 2. Municipal Corpn. 400 600 area other than as per (1) above. 3. Municipal areas 200 300 other than areas as per 1 and 2 above. 4. Rural areas 50 75
2. At the time of sub-leasing/letting out the said premises for industrial user, licence fee at the rate of 10% of above transfer fee and for commercial purpose, at the rate of 12.5% per annum should be charged.

3. With regard to the land sanctioned to Co-operative Housing Societies, on receipt of building completion certificate, permission should be granted to let out area equal to the area which is permitted to be used for commercial purpose in the building by charging licence fee as above.

4. In cases where there has been unauthorised change of user or unauthorised sale, if the concerned persons/organisations come forward on their own within six months of the date of this order transfer/breach of be charged fee for regularising such the condition, they should at the rates mentioned against (1) and (2) above. However, after six months penal fee at the double the rate should be charged.

5. This order should be made applicable with retrospective effect from 9.7.1999 i.e. the date on which a policy decision was taken on allotment of lands to Co-operative Housing Societies. It should also be made applicable to the premises/flats in the building of Co-operative Housing Societies used for commercial purpose.

9. Such cases which are pending from 9.7.1999 should be disposed of by the Collectors in accordance with this policy.

11. There is nothing to demonstrate that 1988 circular was superseded by 23.11.2001 circular. There is a reference made to the 14th June 1988 circular in the Circular dated 23.11.2001. Clause 4 as reproduced above provides that "cases where there has been unauthorised change of user or unauthorised sale and if the concerned persons, organisations come forward on their own within six months of the date of this order for regularising such transfer or breach of the condition, they should be charged fee at the rates mentioned against (1) and (2) above. However, after six months penal fee at the double the rate should be charged." This clause itself provides that this circular is applicable to the unauthorised change of user or unauthorised sale by any person. The present case is also a case of unauthorised change of user. The Government circular of 14th June, also deals with the permission for change of user. As the respondents have taken policy decision to apply the Resolution dated 23.11.2001 retrospectively from 9.7.1999 there remains no doubt that the present case fall within the ambit of this circular as admittedly the cause of action arose on 9th August, 1999, the date of change of user of the premises.

12. Clause 9 as reproduced above further elaborated that such cases which are pending from 9.7.1999 should be disposed of by the Collector in accordance with this policy. The whole object of this circular is to charge rent or transfer fees as per the Clause 1 against those persons who come forward on their own within six months on the date of this order for regularising such transfer or breach of the condition. This circular further provides to regularise such transfer or breach of conditions. In the present case admittedly, there was unauthorised change of user and therefore there was a breach of the condition. However, as per Clause 4, if a party fails to appear within six months as referred above, the penal fee at double the rate should be charged.

13. The submission of the respondents that the resolution dated 23.11.2001 is applicable to the persons who come forward on their own voluntarily within six months of the date of this order is applicable to them only and not to others, is not correct. There is nothing mentioned in this clause or any part of the circular that this circular shall not be applicable to the persons who do not come voluntarily for regularisation of such breach of the conditions. On the contrary, plain reading of the clause and the whole circular shows that the respondents shall charge double the rate, if a party comes after six months from the date of this circular. It means whosoever comes even after six months, this circular will govern them whether they come voluntarily or not.

14. After going through the affidavits and orders passed by the authorities there is nothing mentioned or even in the affidavit filed by the respondents that this circular is applicable only to the persons who come forward within six months or thereafter, voluntarily for regularising such transfer or breach of the conditions. On the contrary it is specifically mentioned in clause that such cases which are

pending from 9.7.1999 should be disposed of by the Collector in accordance with this policy. Therefore, even the cases which are pending on 9.7.1999 have been directed to dispose of in accordance with this policy.

15. When this policy was announced there was no such declaration to the people at large that whosoever comes forward voluntarily, they will be protected or benefited by the clauses of this circular and not otherwise. The plain reading of this Clause 4 on the contrary makes it very clear that whosoever comes within six months the rate of fee should be as per Clause 1 and who comes after six months, the rate would be double.

16. The learned Counsel appearing for the respondents has strongly relied on the judgement of the Apex Court in the case of Union of India and Anr. v. Deoki Nandan Aggarwal AIR 1992 SC 96 on the following paragraph:

14. ...It is not the duty of the Court either to enlarge the scope of the legislation or the intention of the legislature when the language of the provision is plain and unambiguous. The Court cannot rewrite, recast or reframe the legislation for the very good reason that it has no power to legislate. The power to legislate has not been conferred on the courts. The Court cannot add words to a statute or read words into it which are not there. Assuming there is a defect or an omission in the words used by the legislature the Court could not go to its aid to correct or make up the deficiency. Courts shall decide what the law is and not what it should be. The Court of course adopts a construction which will carry out the obvious intention of the legislature but could not legislate itself. But to invoke judicial activism to set at naught legislative judgment is subversive of the constitutional harmony and comity of instrumentalities.

17. The above settled proposition needs no discussion. The facts & circumstances are totally distinct and distinguishable. The Apex Court has recently re-iterated the said principle of interpretation in the case of South Eastern Coalfields Ltd. Vs. Commissioner, Customs and Central Excise, M.P., in the following words:

22. According to the literal rule of interpretation, if the meaning of a word or expression is clear, there is no scope for interpretation and we have to follow the plain and grammatical meaning.

23. However, where the meaning of a word or expression is not clear, obviously the literal rule of interpretation cannot be applied, and hence we have to take resort to other rules of interpretation e.g. Heydon's mischief rule, the purposive rule, etc. In our opinion in the present case the purposive rule should be applied. Under this rule, we have to see the purpose for which the provision was made.

18. In the present case, in absence of any contrary material, the plain reading of Clause 4 or even other clauses nowhere supports the case of the respondents. The plain reading of the above clauses and as elaborated above reflects that it is applicable to all the cases which are pending on 9.7.1999 and thereafter. There is no question of adding any word and/or re-writing or recasting or reframing the

policy in view of the plain reading of the above clauses. The issue is exclusive application of the Government Resolution of 1988 as done in the present case.

19. All the authorities, while passing the impugned orders, failed to assign any specific and detailed reason by holding that the Government Resolution dated 14th June, 1988 was the relevant for regulating the change of user from one specific purpose to another and for more beneficial one, specially Clauses 4, 5 and 9 of the Government Resolution dated 23.11.2001 as reproduced above. This Government Resolution of 23.11.2001 has specifically dealt with the issues like change of user and/or breach of condition. This Government Resolution cannot be read in isolation. The Government Resolution need to be read in totality and with other existing Resolutions. Having once taken a decision to make applicable the Government Resolution of 23.11.2001 retrospectively from 9.7.1999 as referred in Clause 5 and as per Clause 4 it has been specifically considered the case of unauthorised change of user or unauthorised sale and further in view of Clause 9 all such pending cases from 9.7.1999 needs to be disposed of by the Collector accordingly with assigning detailed reasons, that Government Resolution of 14th June, 1988 is only applicable to the facts of the present case and not the Government Resolution of 23.11.2001.

20. As noted, even as per Clause (d) of 14th June 1988 a phrase "at the time of change of user" is used and the same phrase is used in Clause (4) of Government Resolution of 23.11.2001 referring to unauthorised change of user. It appears that the Government Resolution of 23.11.2001 is quite composite one covering also the case of sale or transfer, sub-leasing or letting out and cases of unauthorised change of user like present one.

21. The Government Circular dated 14th June, 1988 as noted and as contended is not superseded by any Government circular; and covers the cases relating to ground rent to be charged while granting permission to use a portion of the building on Government land allotted for some specific purpose or for more beneficial purpose. The relevant Clause (d) is reproduced as under:

(d). In case where a Government plot has been sanctioned with possessory rights, if a permission is to be granted for use of a portion of the building on such a plot of land for more beneficial purpose, licence fee as under should be charged:

On the basis of permissible Floor Space Index at the time of construction of the building, in respect of the land which would have been conceptually required for construction of the portion which is to be used for a more beneficial purpose, at the time of change of user the licence fee should be charged at the prevailing rate of lease rent on the basis of prevailing market rate. The rate of this licence fee should be revised every fifteen years.

22. In view of above Resolution/clause, the Floor Space Index (FSI) at the time of construction of the building in respect of the land which was used for more beneficial purpose, at the time of change of user, the licence fee should be

charged at the prevailing rate of lease rent on the basis of prevailing market rate. The construction of the building in the present case was admittedly prior to 1988 and/or even 1967 there was no concept of FSI available at the time of the construction of the building. The concept of FSI came into force along with the Development Control Rules, 1966 for Greater Bombay (DCR 1966) which came into force with effect from 9.2.1967. Therefore, on the date of construction of the building, the FSI as per the Zone, Rule 8(2) of DCR 1966 was 2.45, as contended by the learned Advocate appearing for the petitioners.

23. Same has been further supported by an order passed by the respondents in reference to similarly located case of Kishco Cutlery Limited having its building at Bharat Bhavan 86, Netaji Subhash Road, Mumbai-2. In that case (while assessing the said appellant) (Kishco Cutlery Limited) based on the Government Circular dated 14.6.1988 the Collector had taken 2.45 FSI for calculating the area of premises for assessing the increased ground rent. There is no justification therefore not to apply the same yardstick in the case of the petitioners' building. There is no specific reason provided in this regard by the respondents while rejecting case of the petitioner based on the FSI as per D.C. Rules, 1967 in Zone, Rule 8(2) as contended. "The concept of FSI at the time of construction of the building" therefore should be based on the D.C. Rules, 1967 and not the Development Control Rules, 1991 (DC Rules, 1991) as amended. The D.C. Rules 1999 provide FSI for Island city (residential zone R-1 and Zone-I R-2) 1.33.

24. The respondents have therefore based on this D.C. Rules, 1991 assessed the case of the petitioner and issued the demand. In absence of any specific provision and as considered by the Collector in the case of Kishco Cutlery Limited the FSI 2.45, as per the earlier available D.C. Rules, 1967, should have been the basis for charging ground rent which was available on the date of notification i.e. 14.6.1988. The FSI 1.33 based on the D.C. Rules, 1991 was not available for any such assessment in the year 1988. There could not have been the intention of the respondents to charge and/or assess the ground rent based on the D.C. Rules, 1991. The respondents failed to consider all these aspects while issuing demand notice based on the G.R. of 23.11.2001 and by considering FSI 1.33 based on the existing D.C. Rules, 1991. The demand notices therefore are also unsustainable specifically for want of clear reasons on applicability of the G.R. dated 14.6.1988 in the facts and circumstances of the case. The respondents have not given cogent and sufficient reasons for applicability of the G.R. of 14.6.1988 and not the G.R. dated 23.11.2001.

25. I am of the view that the respondents should give detail reasons to distinguish these two G.Rs and its applicability to the case like the petitioners, while assessing the petitioners' case, after considering the observations. The respondents should also consider the case of petitioners by giving reasons to reject their case of applicability of old FSI of 2.46 as per D.C. Rules, 1967 and/or support their demand based on D.C. Rules, 1991 on the foundation of 1.33 FSI.

The amount deposited, if any, by the petitioners in reference to the proceedings arising out of the demand in question shall be adjusted by the respondents at the time of passing appropriate order.

26. In this background the matter is remanded with the following directions:

(i) The impugned notice dated 16.10.2002 and impugned orders dated 26.2.2003, 20.10.2003 and 13.6.2005 are quashed and set aside and also all consequential actions.

(ii) The respondents are directed to give reasons while applying the G.R. dated 15.6.1988 or the G.R. of 23.11.2001.

(iii) The respondents if comes to a conclusion, that G.R. of 13.6.1988 is only applicable then how FSI 1.33 as per D.C. Rules, 1991 is applicable and not FSI 2.46 as per D.C. Rules, 1967 and if G.R. dated 23.1.2001 is applicable, pass an order accordingly.

(iv) The respondents, after hearing both the parties, dispose of the matter as early as possible preferably within four months from the date of the receipt of this order.

(v) The amount of Rs. 5 lacs already deposited with the respondents be adjusted accordingly.

27. Petition is disposed of in above terms. No order as to costs.