13 CM 2013

Shephali

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
WRIT PETITION NO. 1244 OF 2012

1. **M/s TCI Industries Ltd,**
   A company incorporated and registered under the Indian Companies Act, 1956, with its Registered Office at 1-7-293, M. G. Road, Secunderabad 500 003 and an office at N.A. Sawant Marg, Colaba, Mumbai 400 005
2. **Mr. Sunil Kamlakar Warekar,**
   of Mumbai, Indian Inhabitant, Executive Director of Petitioner No.1, having office at N.A. Sawant Marg, Colaba, Mumbai 400 005 ...Petitioners

versus

1. **The State of Maharashtra**
   Through the Principal Secretary, Urban Development Department, Mantralaya, Mumbai
2. **The Monitoring Committee**
   through Chairman constituted under Regulation 58(9) of the DC Regulations 1991 having their office at Municipal Head Office, 4th Floor, Mahapalika Marg, Mumbai 400 001
3. **The Monitoring Committee**
   through Member Secretary

Bombay High Court

::: Downloaded on - 14/11/2013 16:17:01 :::

constituted under Regulation 58(9) of the DC Regulations 1991 having their office at Municipal Head Office, 4th Floor, Mahapalika Marg, Mumbai 400 001

4. **Municipal Corporation of Greater Mumbai**, through the Commissioner, having their office at Municipal Head Office, Mahapalika Marg, Mumbai 400 001

5. **Girni Kamgar Karmachari Nivara and Kalyankari Sangh**, having its address at 1/23, Prabhu Cottage, Pt Satwalkar Marg, Mugal Lane, Mahim, Mumbai 400 016 ...Respondents

---

Mr. Aspi Chinoy and Mr. V.R. Dhond, Senior Advocates, along with Mr. Darshan Mehta, i/b Dhruve Liladhar & Co, for the Petitioners.
Mr. E. P. Bharucha, Senior Advocate, along with Ms. Trupti Puranik for the Municipal Corporation of Greater Mumbai.
Ms. Geeta Shastri, AGP, for the State.
Mr. I. A. Saiyed, Advocate, for the 5th Respondent (Girni Kamgar Karmachari Nivara and Kalyankari Sangh).

CORAM : S.C. Dharmadhikari & G.S. Patel, JJ.
JUDGEMENT RESERVED ON : 21st September 2013
JUDGEMENT PRONOUNCED ON : 21st October 2013

Bombay High Court
::: Downloaded on - 14/11/2013 16:17:01 :::

JUDGMENT : (Per G.S. Patel, J.)

1. By this Court's order of 20th August 2013, parties were put to notice that the Petition would be heard finally at the stage of admission. Hence, Rule. On the Respondents waiving service, by consent, Rule made returnable forthwith and taken up for final hearing.

2. Towards the southern end of the Island City of Mumbai, just off Colaba Causeway and at the end of a narrow lane, Narayan Sawant Marg, there lies a very large property. To its east is Mumbai's harbour; to the south, Sassoon Dock. A Naval establishment, INS Shikra, abuts the property on its north and north-east; and, to the west is a developed area that includes several residential buildings, a municipal school, a Naval boat workshop, the Colaba Fire Station and, beyond, Colaba Causeway.

3. This land, City Survey Nos. 18/69, 19/69 and 128 of the Colaba Division, belongs to the 1st Petitioner ("**TCI**"). It covers 39,276 sq mts, just under 10 acres. There are several structures on it, most of them now abandoned. Once, this was one of Mumbai's many fabled cotton textile mills. It is known as Mukesh Mills. Most of the others are concentrated in Central Mumbai. This is the only one in South Mumbai. It is also claimed to be the only one in what is called the CRZ-II Zone; and, as we shall see, it is this zoning that is said to set it apart.[1]

---

[1] Indu Mill, United Mill Unit No.6 off Veer Savarkar Marg at Prabha Devi, is also on the shoreline, on the city's west coast.

Bombay High Court

::: Downloaded on - 14/11/2013 16:17:01 :::

4. On 18th January 1982, the workmen of Mumbai's cotton textile mills went on a strike. That strike lasted for a year. It resulted in the closure of most, if not all, of the city's textile mills. Mukesh Mills was one of these. It ceased functioning on the day the strike began. Later that year, in September, TCI applied for closure of the mill. The State Government opposed this application, and it was not till this Court's orders of 8th April 2003 and 25th April 2003 that closure was finally permitted. The Petitioners claim that by that time, the dues of all their workmen had been settled except for the claims of the relatives or heirs of six former mill workers. By 2004, therefore, there remained only the land and structures of the former mill.

5. Between 1982 and 2003/2004, the statutory and legislative regime governing town planning in Mumbai had undergone, so to speak, a sea change. Town and Country Planning in Maharashtra is governed by the Maharashtra Regional & Town Planning Act, 1966 ("**the MRTP Act**"). That Act requires, *inter alia*, the designated planning authority — in this case, the Municipal Corporation of Greater Mumbai ("**MCGM**") — to prepare a draft Development Plan.[2] This is to be sanctioned by the State Government following a statutorily mandated procedure. A development plan must be revised every 20 years.[3] Till 1991, development in Mumbai was controlled by the Development Control Rules, 1967 ("**the 1967 DC Rules**"). The MCGM undertook a revision as required by the MRTP Act and published, for suggestions and objections, revised draft development control regulations in 1989. These were then

[2] Section 21
[3] Section 38

::: Downloaded on - 14/11/2013 16:17:01 :::
Bombay High Court

taken through the statutory procedure for finalisation. On 20th February 1991, the revised Development Control Regulations for Greater Mumbai ("**the 1991 DCRs**") were notified, to come into effect on 25th March 1991.[4] The 1991 DCRs contained, for the first time, special provisions in Regulation 58 ("**DCR 58**") regulating, controlling and governing future development on the cotton textile mill lands. This DCR 58 was amended on 20th March 2001, following which many privately owned mills have made proposals for development and re-development. We will return to the 1991 DCRs, the MRTP Act and DCR 58 presently; for the moment, we note only the date when they came into force.

6. In the meantime, the Central Government's Ministry of Environment & Forests ("**MOEF**") issued the Coastal Regulation Zone Notification 1991 ("**the 1991 CRZ Notification**") under the provisions of Sections 3(1) and 3(2)(v) of the Environment (Protection) Act, 1986 ("**the EP Act**") and Rule 5(3)(d) of the Environment (Protection) Rules, 1986. The 1991 CRZ Notification came into force on 19th February 1991, a day before the 1991 DCRs were notified. For the first time, the 1991 CRZ Notification provided a statutory framework controlling, restricting and governing development along some 6,000–8,000 kms of India's coastline. It introduced a four-tier classification system of the country's coastal areas, specifically coastal stretches within 500 metres of the High Tide Line on the landward side. We are here concerned with the second of these categories, known as CRZ-II. This is defined to mean areas already developed upto or close to the shoreline. A "developed area" is that area within municipal limits or

4 Notification No. DCR.1090/RPD/UD-11 dated 20th February 1991

Bombay High Court

::: Downloaded on - 14/11/2013 16:17:01 :::

in other legally designated urban areas already substantially built up and provided with drainage and approach roads and other infrastructural facilities, such as water supply and sewerage mains. While the 1991 CRZ Notification was subsequently amended several times, and later replaced, at the relevant time — in 2003/2004 — it controlled development of CRZ-II areas by, *inter alia*, prohibiting construction on the seaward side of existing roads or existing authorised structures. It then provided that all buildings permitted on the landward side of existing and proposed roads and existing authorised structures would be subject to ***the existing local Town & Country Planning Regulations, including the existing norms of FSI/FAR***. Reconstruction of authorised buildings, too, was permitted ***subject with [sic] the existing FSI/FAR norms and without change in the existing use***.

7. Thus, at the time when the 1991 CRZ Notification was introduced, the 1991 DC Regulations had not yet come into effect; they were still in draft (of 1989). The proposition at the heart of the submissions made by Mr. Chinoy, Learned Senior Counsel for the Petitioners, is that the Mukesh Mills' land is indubitably within CRZ-II, and therefore cannot be subjected to the discipline of DCR 58 of the 1991 DC Regulations. Its development is controlled by, and only by, the 1967 DC Rules. The entirety of DCR 58 of the 1991 DC Regulations is, he submits, inapplicable to Mukesh Mills, the only (erstwhile) cotton textile mill in Mumbai to be so situated.

8. The evolution of this argument today is of some interest. On 27th July 2004 — at a time when both the 1991 CRZ Notification and the 1991 DC Regulations were in force — TCI made a

::: Downloaded on - 14/11/2013 16:17:01 :::
Bombay High Court

representation to the Government of Maharashtra contending that DCR 58 did not apply to them at all. This application was not based on the introduction of the 1991 CRZ Notification.[5] It proceeded on the footing that since TCI had settled all dues and had no workmen, and was not under proceedings before the Board of Industrial and Financial Reconstruction ("**BIFR**") constituted by the Sick Industrial Companies (Special Provisions) Act, 1985; it did not therefore fall within the ambit of DCR 58. On 10th January 2005, the State Government rejected this submission, saying that DCR 58 applied to the Mukesh Mills property.

9. On 18th August 2006, the MOEF wrote to the State Government clarifying, *inter alia*, that—

> "the DC Regulations which were under implementation on 19/2/1991, i.e., approved DCR of 1967 shall be considered and not the draft of 1989 which came into force on 20/2/1991 as it was still in draft stage on 19/2/1991."[6]

10. On 5th September 2006, TCI applied to the MCGM for permission to develop its property at Mukesh Mills. This application was made under DCR 58 of the 1991 DC Regulations. That application was rejected by the MCGM on 22nd September 2006 on the ground that the required No Objection Certificate from the Navy/Defence authorities of the Government of India had not been submitted by the 1st Petitioner.[7] TCI challenged this refusal in Writ Petition No. 2859 of 2006 before this Court.

---

5 Ex. "A" to the Petition

6 Copy at Ex. "C" to the Petition.

7 INS Shikra, a Naval establishment, lies just to the north/north-east of the Mukesh Mills property.

::: Downloaded on - 14/11/2013 16:17:01 :::

Bombay High Court

11. On 14th December 2007, the Supreme Court delivered its decision in *Suresh Estates Private Limited v Municipal Corporation of Greater Mumbai & Ors.*,[8] one that is of pivotal importance to Mr. Chinoy's submissions. For, he submits, following this decision, the issue of the controlling development regulations for lands in the CRZ-II is no longer *res integra*: it is only the 1967 DC Rules that govern, and the 1991 DC Regulations can have no role whatever and are totally ousted. We will consider that submission presently, but note it here only as part of this petition's chronological narrative.

12. On 15th June 2009, well after the decision in *Suresh Estates*, an interim order came to be passed in TCI's Writ Petition No.2859 of 2006. This court directed the MCGM to process TCI's development permission application made under the 1991 DC Regulations, and also directed that, if granted, the permission's implementation would be subject to further orders of this court.

13. While that order continued to operate, TCI changed tack. On 16th February 2010, it submitted revised plans for the development of the Mukesh Mills lands.[9] These revised plans were based, it is claimed, on the 18th August 2006 clarification by the MOEF and the decision in *Suresh Estates*,[10] for TCI now contended for the first time that only the 1967 DC Rules were applicable to its property at Mukesh Mills, and hence sought permission on the basis of that regulatory framework. The revised plans proposed a five-star hotel with a Floor Space Index ("**FSI**") of 7, and a residential building

[8] (2007) 14 SCC 439

[9] Ex. "G" to the petition.

[10] *supra*

::: Downloaded on - 14/11/2013 16:17:01 :::

Bombay High Court

with an FSI of 2.45 on a notional sub-division of the Mukesh Mills lands. The revised proposal was rejected by the MCGM on 10th March 2010.[11] The MCGM contended that such an increased FSI was impermissible in the Island City, where the norm is an FSI of 1.33, and, secondly, that the State Government's letter of 10th January 2005 — which was in response to TCI's very first representation of 27th July 2004 — concluded the issue. TCI filed a statutory appeal under the MRTP Act. This appeal is said to be pending.

14. TCI's Writ Petition No. 2859 of 2006 against the rejection of its proposal under the 1991 DC Regulations was dismissed by this Court on 19th December 2011. A No Objection Certificate from the Naval Authorities was said to be required. TCI filed a Special Leave Petition to the Supreme Court. This was admitted on 9th April 2012 and is also pending.

15. Thus, TCI had two proceedings, both pending but in different forums, and each travelling in opposite directions. Its SLP before the Supreme Court is based on a rejection of its development proposal made under the 1991 DC Regulations; and its statutory appeal under the MRTP Act is against a rejection of a revised proposal under the 1967 DC Rules on the basis that the 1991 DC Regulations do not apply at all.

16. In the meantime, a third front opened up, and this concerns the Monitoring Committee constituted by the State Government under DCR 58 *vide* a Government Resolution dated 24th December

11 Ex. "H" to the petition.

Bombay High Court

::: Downloaded on - 14/11/2013 16:17:01 :::

2001.[12] The mandate of the Monitoring Committee (Respondents Nos. 2 and 3) is, *inter alia*, to monitor the sale and development of mill lands covered by DCR 58 and in accordance with DCR 58(9). In September 2010 — after the MCGM had rejected TCI's revised proposal under the 1967 DC Rules but before this Court dismissed its Writ Petition No.2859 of 2006 — the Monitoring Committee asked TCI for information about the status of the land, arrears of payment to erstwhile workers, and their rehabilitation. There then followed a protracted correspondence between the Monitoring Committee and TCI, going on till July 2013. We are not here concerned with the minutiae of the demands made by the Monitoring Committee, as the argument canvassed by Mr. Chinoy is at once broader and more fundamental, for his contention is that the 1991 DC Regulations are entirely ousted, and that no part of DCR 58 can, therefore, apply to the Mukesh Mills lands; and that it must then necessarily follow that at least in respect of those lands, the Monitoring Committee exercises no jurisdiction. The present Petition impugns four separate orders or directions of this Monitoring Committee, and we note these briefly for that reason as the only challenge to three of these four orders is jurisdictional, not on merits. The fourth order under challenge is, however, explicitly on the issue of jurisdiction.

17. The first Monitoring Committee order under challenge is of 20th November 2010.[13] By this order, the Monitoring Committee referred to previous directions and called on TCI to issue

---

[12] Ex. "2" to the Affidavit in Reply by R.S. Kuknur on behalf of the MCGM.

[13] Ex. "M" to the petition.

Bombay High Court

::: Downloaded on - 14/11/2013 16:17:01 :::

employment certificates to ex-workers based on the mill records or on documents produced by ex-workers. The second order under challenge, dated 17th February 2011, is one by which the Monitoring Committee directed TCI to consider the application made by several hundred workers for service certificates and some 63 applications made by erstwhile workers for their dues.[14] The third order challenged is of 6th March 2012.[15] By this order, the Monitoring Committee noted that workers had complained that TCI's representatives never attended Monitoring Committee meetings, and that several grievances *inter alia* in respect of pending dues, service certificates and the development/re-development of the existing chawls on the Mukesh Mill lands remained unresolved. Throughout this correspondence, TCI maintained that its development proposals had not been approved, that matters were pending in court, and, too, that according to TCI, DCR 58 had no application to the Mukesh Mills lands and that, therefore, the Monitoring Committee lacked jurisdiction to issue any directions at all to the Petitioners.

18. TCI filed the present Petition on 27th April 2012. The first prayer is for a declaration that the Monitoring Committee does not have jurisdiction over TCI's lands and property. On 23rd January 2013, this Court passed an order saying that it would be appropriate if the Monitoring Committee decided the issue of jurisdiction before proceeding further. Time for this decision was later extended. Finally, on 11th July 2013, the Monitoring Committee passed an order rejecting TCI's contentions on jurisdiction and holding that it

14 Ex. "P" to the petition.
15 Ex. "W" to the petition.

::: Downloaded on - 14/11/2013 16:17:01 :::

Bombay High Court

was, indeed, vested with jurisdiction. This is the fourth of its orders under challenge.[16] The petition has been subsequently amended to include a challenge to this fourth order. As this is an order on the question of jurisdiction of the Monitoring Committee, it stands apart from the other three orders which proceed on the assumption that there is such a jurisdiction and, on that basis, give certain directions. We clarify that we are not examining the correctness of the directions in the other three orders under challenge, and leave open all contentions of all parties on those.

19. We have heard Learned Counsel for the appearing parties at considerable length and, with their assistance, have carefully considered the petition, its annexures, and the various Affidavits. Replies have been filed on behalf of the MCGM as also on behalf of the 5th Respondent, the Girni Kamgar Karmachari Nivara and Kalyankari Sangh ("**GKKNKS**").

20. Mumbai's Mill Lands have a history that, according to some writers, not only paralleled the explosive growth of the city, but possibly fuelled it. The first cotton textile mill was established in the mid-1850's in Tardeo. The mill lands had not only the actual textile factories but, importantly from the perspective of town planning and affordable housing, living quarters and accomodation for mill workers, called mill workers' chawls. Historically, this was more a matter of convenience rather than the result of a deliberate imposition of town-planning requirements, since, at the time when the mills were established, these substantial land tracts were vacant. Few could then have anticipated the exponential growth the city

16 Ex. "AC" to the petition.

Bombay High Court

::: Downloaded on - 14/11/2013 16:17:01 :::

around these lands. 130 years after the first mill was established, there were 58 cotton textile mills that, between them, occupied an area of 600 acres, an area some 240 times the size of the Oval Maidan, and employed, it is estimated, over a quarter of a million workers.[17] The mill lands in central Mumbai came to be known as Girangaon, literally, "mill village". Why and how these mills fell into decline and decay is the subject of a great deal of research and writing. Many mills had not modernized. Several registered fatal financial losses and were under the BIFR. In the history of these mills and their decline there is, too, a bloody trail of gangland killings, murder, guns, clandestine deals, underworld dons, and the subversion of trade unions, and at the heart of all this strife lay the mill lands themselves. For, by the time of the textile workers' general strike of 1982, perhaps the final nail in the coffin, the single largest remaining asset of each mill was its land, property values having shot up astronomically. With the final closure of the mills, several hundred thousand workers were rendered jobless. The mill lands and their structures fell into disuse.[18]

21. This was the factual backdrop in which the 1991 DC Regulations introduced DCR 58, a provision specifically directed at

17 This includes the mills taken over by the National Textile Corporation.

18 Many have been redeveloped since 1991, though questions continue to be raised about the form this re-development has taken. Others still lie disused and empty, with little more than façades existing, vast areas that, as we have recently seen in at least one case, have become arenas for the most grotesque and barbaric crimes. In the interstices, temporary uses have been found for parts of these lands: restaurants and bars, shops and boutiques, and even the letting out of areas for film shooting. This last was the subject of some correspondence between TCI and the Monitoring Committee in late 2012 when workers complained that TCI was allowing the Mukesh Mills property to be used for film productions.

::: Downloaded on - 14/11/2013 16:17:01 :::

the mill lands.[19] That DCR is entitled "**Development or Re-development of lands of cotton textile Mills**". It is a provision that, as amended periodically, was considered in detail by the Supreme Court in *Bombay Dyeing & Manufacturing Co Ltd v Bombay Environmental Action Group*.[20] We are not, in the present petition, concerned with the interpretation of any part of DCR 58. We need only note that DCR 58 deals with several aspects, including the development and re-development of mill lands, provision for rehousing and rehabilitation of those in occupation of the mill workers' chawls, the utilisation and deployment of funds that accrue to sick or closed mills or those requiring modernisation or shifting, and so on. While dealing with 're-development' and 'development', DCR 58 covers a very wide panoply of factors and issues. It does not prescribe any universal or uniform FSI for these lands, though it does allow for a computation of fractions of the available FSI and their apportionment, matters fully considered in *Bombay Dyeing*. Though not entirely self-contained, DCR 58 provides a comprehensive matrix for the development and re-development of Mumbai's textile mill lands. The legislative intent is apparent: the mill lands are not to be allowed to be used entirely for the private gain of their owners. Their re-development and development is permitted, subject to conditions that seek to achieve a wider social objective, including providing affordable housing and creating public open spaces. DCR 58(9) is a special provision, one without precedent till the 1991 DC Regulations. Under sub-clause (a), a

---

19 That these DC Regulations, like all development control regulations framed under the MRTP Act, are a form of subordinate legislation and have the force of law is not in issue: *see Promoters & Builders Association of Pune v Pune Municipal Corporation*, (2007) 6 SCC 143

20 (2006) 3 SCC 434

::: Downloaded on - 14/11/2013 16:17:01 :::

Bombay High Court

Monitoring Committee is constituted under the Chairmanship of a retired High Court judge:

> (9)(a) In order to oversee the due implementation of the package of measures recommended by the Board of Industrial and Financial Reconstruction (BIFR) for the revival/ rehabilitation of a potentially sick and/or closed textile mill, or schemes approved by Government for the modernisation or shifting of cotton textile mills, and the permissions for development or redevelopment of lands of cotton textile mills granted by the Commissioner under this Regulations, the Government shall appoint a Monitoring Committee under the chairmanship of a retired High Court judge with one representative each of the cotton textile mill owners, recognised trade union of cotton textile mill workers, the Commissioner and the Government as members.

(*emphasis supplied*)

22. This Monitoring Committee has, in the matters of issue and enforcement of notices and attendance, the powers of a Civil Court.[21] It can prescribe guidelines for the sale or disposal of built up space, open lands and balance FSI by the textile mills,[22] and for the opening, operation and closure of escrow accounts;[23] approve proposals for the application of these funds;[24] monitor the implementation of DCR 58 as regards housing, alternative employment and related training of cotton textile mill workers.[25] This provision explicitly recognizes the linkage between town planning and social requirements; that balanced town planning is a

21 DCR 58(9)(d)
22 DCR 58(9)(c)(i)
23 DCR 58(9)(c)(ii), read with DCR 58(8)
24 DCR 58(9)(c)(iii)
25 DCR 58(9)(c)(iv)

Bombay High Court

::: Downloaded on - 14/11/2013 16:17:01 :::

form of social re-engineering and is not limited to the creation of built forms. Planning is more than architecture or engineering. It speaks to the fabric of a society, of which the physical built form is but one incident. How and where we choose to live and work, in what conditions and at what cost, how we commute from one to the other are all matters that travel beyond the narrow considerations of the architecture or engineering of individual buildings. These are often matters of policy. When vast areas that once provided both employment and residence are now to be redeveloped, how should they be used? By whom? Should these lands remain the profitable playgrounds of owners, or should wider concepts of social and spatial justice in planning law be brought to bear in assessing the manner and method of development? What DCR 58 attempts is to restrict what Rahul Mehrotra of the Graduate School of Design at Harvard University describes as the "architecture of impatient capitalism" and to place it against a possibly slower, but no less impatient, design of social engineering.[26] What is then of cardinal importance in assessing the applicability of DCR 58 is sub-clause (10), which reads:

> 58(10) Notwithstanding anything stated or omitted to be stated in these Regulations, the development or redevelopment of all lands in Gr. Mumbai owned or held by all cotton textile mills, irrespective of the operational or other status of the said mills or of the land use zoning relating to the said lands or of the actual use for the time being of the said lands or of any other factor, circumstance or consideration whatsoever shall be regulated by the provisions of this regulation and not under any other Regulation.

(*emphasis supplied*)

---

26 It is not accident that Darryl D'Monte's study of these lands and of the overall decline of Mumbai carries the title *Ripping the Fabric*.

::: Downloaded on - 14/11/2013 16:17:01 :::

23. This sub-clause was introduced by an amendment dated 14th June 2006.[27] It leaves no manner of doubt that no other DC Regulation, or any provision as to zoning or land-use, or any other consideration whatever is to govern the development and re-development of textile mill lands.

24. Mr. Chinoy does not dispute this. He only says that the *whole* of DCR 58 does not apply to Mukesh Mills; and that Mukesh Mills is, in that sense, *sui generis*, unlike the other mill lands in central Mumbai, for it falls within a CRZ-II zone. His argument, as we understood it, is that the 1991 DC Regulations are entirely eclipsed and nothing in them, no matter how laudable or desirable, and whatever their social objective, can have any application at all to the Mukesh Mill lands. This, he says, is the law, and it is clear from (i) the provisions of the 1991 CRZ Notification; (ii) the MOEF's clarification of 18th August 2006; and (iii) the Supreme Court's decision in *Suresh Estates*.[28]

25. Before we examine the effect of the 1991 CRZ Notification, we must note that it has been entirely superseded by another Coastal Regulation Zone Notification of 2011 ("**the 2011 CRZ Notification**"), also brought into force by the MOEF under the same provisions of the EP Act and Rules.[29] Section V of the 2011 CRZ Notification deals with "Areas requiring special consideration", and CRZ area that fall within municipal limits of

[27] Notification No. TPB 432001/2174/CR-227/01/UD-11

[28] *supra*

[29] *Vide* Notification No. S.O.19(e) dated 6th January 2011, published in the Gazette of India, Extra., Part-II, Section 3, sub-section (ii).

Bombay High Court

::: Downloaded on - 14/11/2013 16:17:01 :::

Greater Mumbai is one such area. For CRZ-II areas in Greater Mumbai, the 2011 CRZ Notification says that

> (iii) In CRZ-II areas—
>
> (a) The development or re-development shall continue to be undertaken in accordance with the norms laid down in the Town and Country Planning Regulations as they existed on the date of issue of the notification dated 19th February 1991, unless specified otherwise in this notification.

26. The CRZ Notification itself has a history that dates back now some three decades to the early 1980s when the then Prime Minister, Ms Indira Gandhi, initiated action to protect India's coasts. In 1981, she sent an advisory to the governments of those states that had coastal areas, calling on them to implement protective and precautionary measures for their coast lines, beaches and marine biodiversity while promoting development in these areas. Later guidelines issued for beach protection were found to be ineffective. They lacked statutory force. It is in this context, and with this intention of protecting India's coastal ecology and environment, that the CRZ Notification was first issued in 1991. The CRZ Notifications have a purpose entirely different from that of the 1991 DC Regulations (or, for that matter, the 1967 DC Rules). The former are environmental regulations, directed to environmental and ecological protection. They are not, strictly, planning regulations at all. For the purpose of protecting the coastal environment and coastal ecology they do restrict development; but they are not "town planning laws" as contemplated by town and country planning statutes like the MRTP Act. That Act, and its subordinate legislations, operate in a wholly different sphere. They are not only protective, nor is their objective limited to protection of

Bombay High Court

::: Downloaded on - 14/11/2013 16:17:01 :::

any one particular aspect of a town or a region's environment or ecology. They cover the entire gamut of town and country planning, from zoning and land use to specifying permissible constructions, heights, restrictions and exemptions. They operate at a very detailed and a granular level within their command areas. Indeed, this is their statutory mandate, as Section 22 of the MRTP Act makes clear. That section says that a development plan, of which regulations are a part, must generally indicate the manner in which land use is to be regulated and the manner in which development may be permitted. The section identifies 13 separate classes of matters, and every development plan must, as far as may be necessary, provide for all or any of these. The identified matters range from land use to designations of land for public purposes such as schools, colleges and so on; reservations of lands for open spaces and playgrounds; infrastructural development, including water supply, sewerage, sanitation, communications and transport, mass transit, conservation of places of historical, natural, architectural or scientific interest; pollution control measures; reclamation; and provisions for "permission to be granted for controlling and regulating the use and development of land within the jurisdiction of a local authority". The CRZ Notification, in either iteration, is not a planning statute. It does not supplant the town and country planning regulations anywhere. It only seeks to restrict development in those areas in coastal cities that lie within a specified distance of the shoreline, in furtherance of its legislative intent of protecting coastlines throughout the country. The CRZ Notification is essentially restrictive or prohibitory, not permissive; it imposes an additional layer of restrictions over existing town and country planning regulations. The intention of the CRZ Notification could

::: Downloaded on - 14/11/2013 16:17:01 :::

Bombay High Court

not have been to permit *greater* development in coastal areas. That would clearly defeat the very purpose and intent of the CRZ Notification. It is not enough, in our view, to interpret the CRZ Notification absolutely literally; we must adopt a purposive approach to its interpretation, especially if a literal construction is likely to result in an anomaly, absurdity or disharmony with another statute or regulation that also governs.[30]

27. In *Suresh Estates*[31] the Supreme Court had before it a situation wholly unlike the present one. It is true that the Supreme Court was there also concerned with a development proposal for a residential hotel and a commercial project in a CRZ-II area in Greater Mumbai. But in that case, the only application made by the project proponents was under the 1967 DC Rules.[32] Here, as we have seen, TCI first made an application on 27th July 2004 to the State Government saying that DCR 58 did not apply to its Mukesh Mills lands not on account of the CRZ Notification but because it had settled the dues of all its workmen and was not under BIFR. It then made an application for development on 5th September 2006 under the 1991 DC Regulations. That application was refused for an entirely different reason, the want of an NOC from the Naval authorities. That issue is pending before the Supreme Court. TCI has, in parallel, *also* made a third application, this one for development under the 1967 DC Rules, and it did so without giving up its first application. This last application, too, has been rejected, and even on TCI's own showing a statutory appeal in that regard is

30 *UCO Bank v Rajinder Lal Capoor*, (2008) 5 SCC 257; *Bombay Dyeing, supra*.

31 *Supra*

32 *Suresh Estates, supra*, para 4

Bombay High Court

::: Downloaded on - 14/11/2013 16:17:01 :::

still pending. The Petitioners' reliance on *Suresh Estates* is, therefore, misplaced as it is, with the greatest respect, clearly distinguishable on facts.

28. In *Suresh Estates*, the Supreme Court rejected the submission that the 1967 DC Rules would not apply to development projects in CRZ-II areas. It held that the word "existing" in the CRZ Notification was a reference to the town and country planning regulations in force as on 19th February 1991, not on the date of grant of the permission. The CRZ Notification explicitly refers to "existing" structures and roads and, therefore, all building activity permitted under the notification is, in the words of the Supreme Court, "frozen to the laws and norms existing on the date of the notification". Since, on that date, 19th February 1991, the only building regulations in existence were the 1967 DC Rules, and since the CRZ Notification has a wide *non-obstante* clause, development applications for CRZ-II plots would be governed by the 1967 DC Regulations, not the 1989 draft regulations. We may note here that the Supreme Court upheld the decision of this Court in *Overseas Chinese Cuisine (India) (P) Ltd v Municipal Corporation of Greater Mumbai*[33] to the same effect as regards the applicability of the 1967 DC Rules to CRZ-II lands. But the Supreme Court was also unambiguous in saying, in para 32, that the CRZ Notification has only frozen the FSI/FAR (Floor Area Ratio) norms. In *Suresh Estates*, the plot in question was under a reservation for a public purpose, viz., a playground for a secondary school. Would the CRZ

[33] (2000) 1 Bom CR 341; followed in *Buildarch v Union of India*, (2000) Supp Bom CR 564 and *Kisan Mehta v State of Maharashtra*, (2001) 1 Bom CR 451

::: Downloaded on - 14/11/2013 16:17:01 :::

Bombay High Court

Notification have the effect of ousting the operation of Section 127 of the MRTP Act, which deals with lapsing of reservations? The Supreme Court said that it could not, and Section 127 would continue to operate since all that the CRZ Notification does is to freeze FSI/FAR norms and pin these to the standards of the 1967 DC Rules. Thus, in *Suresh Estates*,[34] the Supreme Court explicitly recognized the protective and preservative objectives of the CRZ Notification. We must note here that the decision of this Court in *Overseas Chinese Cuisine* is of 2000. It pre-dates TCI's first application of 27th July 2004 to the State Government to be exempted from the operation of DCR 58. It also pre-dates TCI's development application of 5th September 2006 under the 1991 DC Regulations. It seems to us entirely unlikely that TCI was, as it claims, "unaware" of the legal situation as regards the CRZ Notification and the 1967 DC Rules till the decision in *Suresh Estates*. There is no manner of doubt that TCI's first application of 27th July 2004 was on legal advice. Yet it made no claim invoking the applicability of the 1967 DC Rules although, four years earlier, this Court in *Overseas Chinese Cuisine* had already pronounced on the matter; and the decision in *Suresh Estates* was still three years in the future.

29. Mr. Chinoy's argument today is not restricted to the grant or refusal of additional FSI, though the Petitioners' application under the 1967 DC Rules is for an FSI as high as 7 for the hotel and 2.45 for the residential complex. What he suggests is that even those aspects of the 1991 DC Regulations that are unrelated to the *quantum* of FSI that may be granted must be completely excised

34 *supra*

::: Downloaded on - 14/11/2013 16:17:01 :::

Bombay High Court

from consideration. This creates something more than an anomaly; it creates a legislative singularity, a statutory black hole as it were, from whose gravity nothing escapes. Were this to be accepted there then would be within the Island City isolated islands or stretches where not a single aspect of current town planning regulations would apply. Present-day needs and considerations would have to be entirely ignored. CRZ-II plots would have to be treated as standing outside the city, stripped of all context, physical, geographic and architectural and social. In a city surrounded on three sides by the sea, the consequences could well be catastrophic. It is difficult to accept the argument, even by necessary implication, that this is the result the Supreme Court intended in *Suresh Estates*. We understand that decision to mean that the intent of the CRZ Notification was to freeze and restrict development, not to foster it at the cost of sound and balanced town and country planning. It is for this reason that, while saying that it is the 1967 DC Rules that would apply, the Supreme Court later in the same decision in terms said that the CRZ Notification has "*only frozen the FSI/FAR norms.*" This is plainly evident from the phrasing of the 1991 CRZ Notification itself, the relevant portions of which read:

> (i) Buildings shall be permitted only on the landward side of the existing road (or roads proposed in the approved Coastal Zone Management Plan of the area) or on the landward side of existing authorised structures. Buildings permitted on the landward side of the existing and proposed roads/existing authorised structures shall be subject to the existing local Town and Country Planning Regulations including the existing norms of Floor Space Index/Floor Area Ratio.
>
> (ii) Reconstruction of the authorised buildings to be permitted subject to the existing FSI/FAR norms and without change in the existing use.

::: Downloaded on - 14/11/2013 16:17:01 :::

30. The word "including" in the first clause must, we believe, necessarily receive a restricted meaning if the purposes and objectives of the CRZ Notification are to be served, and if the legislative anomaly we have noticed above is to be avoided. This is the only interpretation that serves both these objectives while retaining consistency with the decision in *Suresh Estates*. The alternative is a complete ouster of DCR 58 from its application to the Mukesh Mills lands. It is, in our view, not possible to accept such an interpretation; and to do so would be to attribute to the *Suresh Estates* decision things it does not say and could not have intended. We have earlier noted the wider social objectives of DCR 58, and, too, the very wide gamut of factors that any development plan must attempt to address. Every one of these objectives would be completely lost if we were to wholly exclude the operation of DCR 58. At the cost of repetition, we must note that DCR 58 does not itself fix any particular FSI. It provides for the apportionment or utilization of that FSI. Whether that FSI is fixed under the 1967 DC Rules or the 1991 DC Regulations is immaterial to the operation of DCR 58 generally and to DCR 58(8) and 58(9) in particular. In this context, two aspects must be emphasized. First, that the demands of the Monitoring Committee are not directed to FSI or the nature or type of the proposed development at all. They are directed to the achievement of social welfare objectives, including the rehabilitation of workers, the settlement of their dues, the issuance of service certificates and so on. TCI itself accepted this when it made its application on 27th July 2004 for exemption from DCR 58, for the only basis of that application was its fulfilment of its statutory obligations under industrial and labour law, not the ouster of the entirety of the 1991 DC Regulations. All these objectives would be

::: Downloaded on - 14/11/2013 16:17:01 :::

Bombay High Court

regard to marginal open spaces, the percentage of built up areas for plots, the location, number, size, height, number of floors and character of buildings and population densities, permissible building uses, land sub-divisions, and more. Are the provisions of Section 24 of the EP Act and Section 22(m) of the MRTP Act in conflict? The Petitioners' argument necessarily implies that in giving effect to Section 24 of the EP Act, town planning considerations under Section 22(m) stand ousted or eclipsed. The former seeks to achieve overarching environmental protection; the latter speaks of matters that are, by their very nature, "interventions" in the natural order of things; matters that entail some degree of environmental damage. The Petitioners' argument therefore posits a situation of abandonment of town planning in the name of environmental protection. This is unacceptable and no statute can be read in a way that creates such a conflict or disharmony.

32. In *Essar Oil Ltd v Halar Utkarsh Samiti*,[35] the Supreme Court noted the impact of the 1972 Stockholm Declaration and its various principles, especially on subsequent amendments to our Constitution. Principle 8 of that Declaration says that economic and social development is essential to ensure a favourable living and working environment for man and for creating conditions on earth necessary to an improvement of the quality of life. That decision also notes Principle 11, which requires that environmental policies must not adversely affect future development. Clearly this is the background of the CRZ Notifications: not to permit unchecked future development at the cost of environmental protection, but to balance one against the other. These must be harmonized so that

[35] (2004) 2 SCC 392

Bombay High Court

::: Downloaded on - 14/11/2013 16:17:01 :::

one is not sacrificed to the other must be the objective, given that man's very existence is a constant threat to the environment, and that every developmental intervention is, to a greater or lesser extent, an environmental threat.[36] The Aravalli Mining case before the Supreme Court, too, contains a ringing endorsement of these principles,[37] when the Supreme Court said that development and environmental protection are not enemies; and that where there is doubt, environmental protection must take precedence over economic interests.[38] It is increasingly fashionable to speak of environmental protection as "coming in the way" of development, as if to suggest that the two are antipodal concerns, or that "development" means only more bridges, roads, infrastructure, buildings, and that "environmental protection" being limited to the preservation of idyllic sylvan areas, to give it overmuch emphasis in decision-making and planning is a nuisance and an impediment. This is unthinking and ill-informed. The opening paragraph of the Supreme Court's decision in *Sachidanand Pandey v State of West Bengal*[39] must forever be borne in mind; and, in that decision, the Supreme Court said that "uncontrolled growth and the consequent environmental deterioration are fast assuming menacing proportions and all Indian cities are afflicted with this problem."

33. The demands of environmental and ecological protection are not inimical to those of sound town planning either. Both look ahead; the former seeking to preserve precious natural resources for future generations, the latter to anticipate the changing and growing

36 *Essar Oil, supra*, para 27
37 *M.C. Mehta v Union of India*, (2004) 12 SCC 118
38 *M.C. Mehta, supra*, para 48
39 AIR 1987 SC 1109

Bombay High Court

::: Downloaded on - 14/11/2013 16:17:01 :::

needs of cities. Both are long-term, forward-looking measures. Both attempt to realize future needs, demands and necessities. The final objective is common: a sustainable, livable urban environment in balance with the natural one. This may seem a Utopian dream, difficult to achieve, but the alternative, a dystopian nightmare, comes all too easily. The visions of utopia and dystopia are separated only by myopia. The argument before us seems to us to move in exactly the opposite direction, in that it seeks an order allowing that which was apposite in the past to enure for several decades in future, unmindful of the consequences. What the Petitioners suggest, therefore, is that they be permitted to build on their land at Mukesh Mills in an already extensively developed locality, availing of additional discretionary benefits as to FSI, without being required to make over any portion of their land for public purposes and without being under any kind of obligation to fulfil statutory obligations under socially-oriented industrial, labour and town planning enactments. They seek all this in the name of environmental protection as being the intended consequence of the CRZ Notification. This, in our view, is a misreading of the purpose and intent of the CRZ Notification. That Notification did not, and in its 2011 iteration does not, seek to permit more development at the cost of the coastal environment; yet that would necessarily be the very effect of the Petitioners' argument. Our survival and the survival of our cities depends on how we address the problems of the present and anticipate the problems of the future; and this includes pollution, population growth, housing scarcity, the lack of public open spaces, overcrowding, and allied developmental imbalances.

Bombay High Court

::: Downloaded on - 14/11/2013 16:17:01 :::

This has been recognized by the Supreme Court itself.[40] Attempts at achieving social, economic and spatial equity in our cities are intertwined with their physical form, and the 'fabric' of a city encompasses all these elements. To look only to the built form and its permissible extent without considering these other factors is to betray fundamentals of town planning. After all, a livable city is one that is both equitable and sustainable. Mr. Chinoy's argument is one of seductive simplicity; yet, its implications are profoundly alarming. Just as sailors in ancient mythology learned to beware the alluring songs of Sirens, tempting them to their doom on treacherous shoals, we too must be cautious in accepting an argument that not only bodes ill for the future but attempts to realize that which was never intended. Hindsight is usually the lack of foresight. It is a luxury neither our cities nor we can afford.

34. In our view, Mr. Bharucha, Learned Senior Counsel appearing for the MCGM, and Mr. Saiyed, Learned Counsel for the 5th Respondent workers' organisation, the GKKNKS, are therefore justified in contending that there can be no such complete ouster of DCR 58. The issue in *Suresh Estates*, as they point out, was as to the applicable law for development. The Supreme Court was not called upon to decide questions of land surrender or housing; and it is, therefore, not permissible to attribute to *Suresh Estates* matters that it did not decide. Both Mr. Bharucha and Mr. Saiyed were at pains to point out that the Petitioners' argument, if accepted, would result in a manifest social and welfare injustice and imbalance, in that the

---

40 *Usman Gani J. Khatri of Bombay v Cantonment Board & Ors.*, (1992) 3 SCC 455, para 23; *State of West Bengal v Terra Firm Trading and Investment (P)Ltd.*, (1995) 1 SCC 125, para 10.

::: Downloaded on - 14/11/2013 16:17:01 :::

Bombay High Court

Petitioners would then claim, and possibly get, a huge FSI but, at the same time, would evade the responsibility to surrender land for public purposes such as housing and open spaces; and would also not be subjected to the discipline of DCR 58(8) and 58(9), both of which seek to achieve, through the mechanism of town planning, objectives of social and spatial justice. In its fourth impugned order dated 11th July 2013, which we have read with the assistance of both Mr. Bharucha and Mr. Saiyed, the Monitoring Committee sets out briefly the historical background of the mill lands and DCR 58 and notes, in our view correctly, that DCR 58 as amended in 2001 has two aspects: the first dealing with what the Monitoring Committee calls the "nitty gritty of development/re-development of the mills and their lands" and the other with the protection of workers' rights to housing, dues to workers, etc. The Monitoring Committee is a statutory "watchdog" to ensure that the proceeds from development and re-development are utilized for the benefit of workers. It also notes that the operation of the CRZ Notification is unrelated to ownership of the textile mill lands, questions of surrender of land, protection of workers and other matters that lie within the ambit of DCR 58. Therefore, the Monitoring Committee notes, the development of the Mukesh Mills property will be in accordance with the 1967 DC Rules and the 1991/2011 CRZ Notification, but this is not inconsistent with the amended DCR 58 under which the Monitoring Committee must oversee questions, among others, of surrender of land for public purposes to government agencies and authorities, the utilization and disbursement of funds accruing from such re-development, and the protection of workers' rights as to their housing and dues. The view taken by the Monitoring Committee is, we find, entirely consistent

::: Downloaded on - 14/11/2013 16:17:01 :::

Bombay High Court

with our own in this matter, and cannot be faulted. It correctly balances the demands of the CRZ Notification with the objectives of DCR 58.

35. It also seems to us clear that TCI's purpose is not as pellucid as it makes out. In 2004, it attempted to avoid the operation of DCR 58 though not of the 1991 DC Regulations. Its present attempt is a revisitation of that very application, previously rejected, though from another perspective. The effect of the two applications, separated by a decade, is identical: TCI should be permitted to avoid all its statutory, social and planning obligations and liabilities under DCR 58, including those that seek to protect rights of workers and the surrender of land for public purposes. Any submission that has this effect must be repelled. We must, in deciding these matters, have regard to the implications of the submissions made and cannot confine ourselves to literal interpretations.

36. Under Rule 10(2) of the 1967 DC Rules, the Municipal Commissioner of the MCGM has the discretion to permit a higher or increased FSI. This discretion, it is settled, cannot be exercised in an arbitrary, capricious or whimsical fashion. It must conform to the requirements of Article 14 of the Constitution of India. There can be no doubt about this proposition; *Suresh Estates* says so in terms.[41] We understand this to mean that the Municipal Commissioner must consider all relevant factors while exercising that discretion. His hands are not tied merely by citing examples of other projects where, in the past, additional FSI has been permitted under the 1967 DC Rules. Article 14 militates against arbitrariness and hostile

41 *Suresh Estates, supra*, para 33

::: Downloaded on - 14/11/2013 16:17:01 :::

Bombay High Court

discrimination; it does not prohibit a rational and intelligible differentiation. The Mumbai of 2013 is not the Mumbai of 1967, let alone the Mumbai of the 1850's. There is far more development and growth already. There are requirements of public safety and public health, including fire-fighting norms that must, in the larger public interest, be considered. The Municipal Commissioner, while granting or refusing the application for additional FSI, must take into account all relevant facts and considerations, including the ones we have mentioned.[42] He need not be limited to a consideration of whether some other project has previously been granted additional FSI. How much additional FSI is to be granted, if any, is a matter for him to decide after weighing in the balance all the relevant material, including the needs and demands of the city as he finds it today, and looking ahead to the requirements of tomorrow.

37. The question of whether or not a No Objection Certificate is required from the Naval authorities is, of course, a matter yet pending before the Supreme Court, the Petitioners' case on that having already being negatived by this Court. That is a separate issue and is beyond the remit of the present petition. There remains the question of the Petitioners' statutory appeal under the MRTP Act, also said to be pending, against the rejection of TCI's development proposal under the 1967 DC Rules, following *Suresh Estates*. That appeal may now be infructuous, since the issue in that appeal — viz., the complete occlusion of the 1991 DC Regulations and, therefore, DCR 58 — is also now before us. But that is of the Petitioners' making. They sought to leapfrog the appeal by insisting, albeit through another dimension, viz., the jurisdiction of the

42 *S. N. Rao v State of Maharashtra*, (1988) 1 SCC 586.

::: Downloaded on - 14/11/2013 16:17:01 :::

Bombay High Court

Monitoring Committee, that the issue of inapplicability of the entirety of the 1991 DC Regulations be decided by us.

38. In the result, we find that the 3rd Respondent, the Monitoring Committee, will continue to have jurisdiction in terms of its powers under DCR 58. Rule is discharged and the Petition is accordingly dismissed. There will be no order as to costs.

39. At this stage, Mr. Mehta, learned Advocate appearing for the Petitioners prays for stay, because in his submission the Monitoring Committee will resume its regular hearings; and particularly now that this Court has declared that it has jurisdiction to monitor the Petitioners project.

40. Mrs. Punjabi, learned Advocate appearing for the Municipal Corporation, submits that there was no ad-interim order in force. As we have decided the jurisdictional issue, and since this was argued purely on the basis of legal provisions, we do not see how we can stay our conclusions in this judgment. The request for stay is, therefore, refused.

(G.S. Patel, J.) **(S.C. Dharmadhikari, J.)**

Bombay High Court

::: Downloaded on - 14/11/2013 16:17:01 :::