

O/C

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**PRESIDENT, NAVI MUMBAI**

Prakash Baviskar

Ref. No. MCHI/PRES/17-18/127

January 23, 2018

To,

**Shri Ajoy Mehta (I.A.S.)**

Municipal Commissioner,

Municipal Corporation of Greater Mumbai

Mumbai - 400 001

**Sub: Grant of additional Transferable Development Rights ["TDR"] by issuing Development Rights Certificates ["DRCs"] for an area equivalent to the area of the construction/ development of the DP Roads, in accordance with the then existing Clause 6 of Appendix VII-A of the DC Regulations and Sec.126(1)(b) of the MR&TP Act, 1966.**

**Ref: Sec.126 (1) (b) of the MR&TP Act**

**Clause 6 of the then existing Appendix VII-A of the DC Regulations.**

**Notification dated 16<sup>th</sup> November, 2016**

**Orders passed by the Supreme Court of India and the Bombay High Court**

Dear Sir,

As you are aware, CREDAI-MCHI, a Developers Association, takes up the issues faced by its members and discusses the same before the Appropriate forum on their behalf.

This representation is made on the above referred subject, to bring to your notice that the owners/ developers are deprived of their rights of being granted additional TDR by the appropriate authorities despite the position in this regard being clarified in various judgements passed by the Hon'ble Supreme Court of India and the Hon'ble Bombay High Court.

The settled legal position is that when an owner or the lessee of a plot of land reserved for public use in the development plans, surrenders such plot of land, free of cost and encumbrances, the owner/ lessee is entitled to FSI credit in the form of DRC equivalent to the gross area of such reserved plot as stipulated under Clause 5 of Appendix VII-A of the then existing DC Regulations. Further, when the owner/ lessee also constructs/ develops the reserved amenity on the surrendered plot, free of cost and hands over the constructed/ developed amenity to the appropriate authority, such owner/ lessee is entitled to an additional Development Right Certificate in the form of FSI for an area equivalent to the construction/ development done by the owner/ lessee. Clause 6 of the Appendix VII-A of the DC Regulations reads as under:

*" When an owner or lessee also develops or constructs the amenity on the surrendered plot at his cost subject to such stipulations as may be prescribed by the Commissioner or the appropriate authority, as the case may be and to their*

*satisfaction and hands over the said developed /constructed amenity to the Commissioner / appropriate authority, free of cost, he may be granted by the Commissioner a further DR in the form of FSI equivalent to the area of the construction /development done by him, utilization of which etc. will be subject to the Regulations contained in this Appendix"*

Further, the term 'amenity' has been defined in Sec.2(2) of the MR&TP Act, 1966 as:

*"(2) "amenity" means roads, streets, open spaces, parks, recreational grounds, play grounds, sports complex, parade grounds, gardens, markets, parking lots, primary and secondary schools and colleges and polytechnics, clinics, dispensaries and hospitals, water supply, electricity supply, street lighting, sewerage, drainage, public works and includes other utilities, services and conveniences;"*

As mentioned hereinabove, this legal position has been clarified by various judgements of the Hon'ble Supreme Court of India as well as the Hon'ble Bombay High Court, wherein the Hon'ble Courts have held that the Planning Authority/ Development Authority/ Appropriate Authority is bound to grant additional TDR in the form of DRCs equivalent to 100% of the area of the construction/ development of the DP Roads as stipulated under the MR&TP Act, 1966 and the DC Regulations.

The judgements passed by the Hon'ble Supreme Court of India & Hon'ble High Court of Bombay, in the cases of Godrej & Boyce Manufacturing Co. Ltd. v/s. State of Maharashtra, MCGM v/s Yeshwant Jaganath Vaity and Ors. and Natwar Parikh & Co Pvt Ltd, Norvatis India Ltd, Shrikant H. Soni V/s. Asst. Director, Town Planning Authority for Nashik Municipal Corporation & Ors. and Mangal Prabhat Lodha v/s State of Maharashtra & Ors. may be looked at. (**Copies enclosed - Annexure I**). Presently more than 20 petitions in this matter is still pending before the Hon'ble High Court.

Despite the aforesaid clear legal position and despite the fact that the developers have developed the reserved amenity free of costs and free from encumbrances, and have thereafter surrendered the same to their satisfaction, the appropriate authorities have however refused to grant to the developers the benefit of additional TDR in the form of DRCs under Clause 6 of Appendix VII-A of the DC Regulations.

It appears that the Corporation has now sought to rely on the Notification dated 16<sup>th</sup> November, 2016 issued by the UDD (copy enclosed), whereby, Appendix VII-A of the DC Regulations is substituted by the Schedule annexed to the Notification.

We state that the said amendment is prospective in nature and applies only to acquisitions/ developments taken place after 16<sup>th</sup> November, 2016. The same cannot therefore be applicable for earlier acquisitions/ developments. In any event, even assuming without admitting that the amendment is to apply retrospectively, the same does not and cannot take away and/ or deprive the owners/ developers of their rights which have already accrued to / vested in them under law.

In the circumstances, we request you to kindly consider this matter and issue directions to grant additional TDR in the form of DRC equivalent to 100% of the area of the construction development of Road under MR & TP act / MMC act.

Thanking you,

Yours faithfully,  
For CREDAI-MCHI



**Mayur Shah**  
President



**Domnic Romell**  
Hon. Secretary



**S. S. Hussain, I.A.S. (Retd.)**  
Chief Executive Officer

**Annexure -I**

**List of Hon'ble Supreme Court & High Court of Bombay Orders in Amenity TDR Matter**

Sr. No.	Case details	Petitioner/Respondents	Orders
1.	Supreme Court Civil Appeal No. 1746 of 2007  Coram: <b>Markandey Katju &amp; Aftab Alam, JJ</b>	Godrej & Boyce Manufacturing Company Ltd.... Appellant v/s State of Maharashtra... Respondents	Order Dt. 6 <sup>TH</sup> February,2009.  "The said Appeals and the Writ Petition are allowed"  Detailed copy enclosed herewith.
2.	Supreme Court Civil Appeal No. 2575 of 2010.  Coram: <b>V. S. Sirpurkar &amp; T. S. Thakur, JJ</b>	Municipal Corporation of Greater Bombay and Another... Appellants v/s Yeshwant Jaganath Vaity and Others... Resp[ndents.	Orders Dt: 17 <sup>th</sup> March, 2011  "The Hon'ble High Court was right in allowing the Writ Petitions and granting 100% TDR as against the Development of Court Yard by asphaltting the same. We find no merits in the appeal. The appeal is therefore dismissed."  Detailed copy enclosed herewith.
3.	Supreme Court Civil Appeal No. 1748 of 2015  Coram: <b>Madan B. Lokur &amp; N. V. Ramana, JJ</b>	Municipal Corporation of Greater Bombay and Another... Appellants v/s Natvar Parikh and Co. Pvt Ltd and Anr .... Respondents	Order dt. 5 <sup>th</sup> May, 2016  "These appeals are fully covered by the decision of this court in Godrej & Boyce Manufacturing Company Limited V/s. State of Maharashtra.  Detailed copy enclosed herewith.
4.	High Court Writ Petition No. 4172 of 2010  Coram : <b>D. K. Deshmukh &amp; Rajnit More, JJ</b>	Shrikant H. Soni v/s Asst. Director, Town Planning Authority for Nashik Municipal Corporation & Ors.	Order dt. 20 <sup>th</sup> July, 2011  "(7) The Petition succeeds and is allowed. Rule is made absolute in terms of prayers."  Detailed copy enclosed herewith.
5.	High Court Writ Petition No. 9793 of 2012  Coram : <b>V. M. Kanade &amp; K. R. Shriram, JJ</b>	Mangal Prabhat Lodha v/s State of Maharashtra & Ors.	Order dt. 05 <sup>th</sup> August, 2013  "16. Writ Petitions are allowed in terms of prayer clauses. It is clarified that the Corporation shall give additional TDR as prayed for in terms of Prayer Clauses, within 6 months from the date of this order."  Detailed copy enclosed herewith.

**Government of Maharashtra,  
Urban Development Department,  
Mantralaya, Mumbai - 400 032.**

**Dated:16/11/2016**

**ORDER**

No. **TPS-1812/CR-112/12/DCR D Class /UD-13:-** Whereas , in exercise of the powers conferred by Clause (c) of sub-section (1AA) of Section 37 of the said act and all other powers enabling in that behalf, the Government of Maharashtra has sanctioned the **Standardised Development Control and Promotion Regulations for D class Municipal Corporations in Maharashtra** vide notification No. TPS-1812/CR-112/12/DCR D Class /UD-13/Dated 20/09/2016 which appeared in the Maharashtra Government Gazette dated 29<sup>th</sup> Sept. to 5<sup>th</sup> Oct. 2016 (hereinafter referred to as *the said DCPR*);

And whereas, as per the Regulation No.26.3 and 26.4 of the said DCPR, additional FSI over and above the basic FSI shall be granted on payment of premium as decided by the Government from time to time;

Now therefore, in view of the above provision, the Government of Maharashtra here by decided the following Rate of Premium as required under the Regulation No.26.3 and 26.4 of the said DCPR;

<b>Regulation No.</b>	<b>Use</b>	<b>Payment of Premium considering the rate of said land mentioned in Annual Statement of Rates.</b>
Regulation No.26.3	Residential / Mix use.	30 %
	Purely commercial	50 %
Regulation No.26.4	Purely Industrial	40 %

This order shall also be made available on the Government website [www.maharashtra.gov.in](http://www.maharashtra.gov.in) (कायदे/नियम).

**Sanjay  
Balkrishna  
Saoji**

**(Sanjay Saoji)**

**Under Secretary to Government**

Digitally signed by Sanjay Balkrishna Saoji  
DN: cn=Sanjay Balkrishna Saoji, o=Government Of Maharashtra,  
ou=SECRETARY, postalCode=400032,  
st=Maharashtra,  
3.5.4.20=1.302427961964260530145231148b  
58b7f64412c3c3642efdb26f86138af7f,  
serialNumber=169475487748f6d974ac5  
4354a4f75a2924cc0ed7c2064a0a5208742,  
c=Sanjay Balkrishna Saoji  
Date: 2016.11.16 17:31:23 +05'30'

**Copy for information and necessary action :-**

- 1) Director of Town Planning, Maharashtra State, Pune.
- 2) Commissioner of Municipal Corporation, Aurangabad / Nanded / Kolhapur / Solapur / Sangli / Amravati / Akola / Ahamadnagar / Chandrapur/ Parbhani / Latur / Jalgaon / Dhule / Malegaon.
- 3) Joint Director of Town Planning, Nagpur / Amravati / Pune / Aurangabad / Nashik.
- 4) Deputy Director of Town Planning, Urban research cell Pune. (*you are requested to send the above order to respective Corporation and Offices*)
- 5) Desk Officer, UD-29 (Please upload this order on Governemnt web site)

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

**CIVIL APPEAL NO.1746 OF 2007**

GODREJ & BOYCE MANUFACTURING  
CO.LTD.

.... APPELLANT

VERSUS

STATE OF MAHARASHTRA & ORS.

...RESPONDENTS

**WITH**

**CIVIL APPEAL NOS.1591-1592 OF 2007**

GODREJ & BOYCE MANUFACTURING  
CO.LTD. & ANR.

.... APPELLANTS

VERSUS

STATE OF MAHARASHTRA & ORS.

...RESPONDENTS

**WITH**

**CIVIL APPEAL NO. 2045 OF 2007**

MRS. JYOTIKA B.PATEL & ANR.

... APPELLANTS

VERSUS

THE MUNICIPAL CORPORATION OF

GREATER MUMBAI

... RESPONDENT

**AND**

**WRIT PETITION (C) NO.190 OF 2007**

MRS. JYOTIKA B.PATEL & ANR.

... PETITIONERS

VERSUS

STATE OF MAHARASHTRA & ANR.

... RESPONDENTS

**JUDGMENT**

**AFTAB ALAM, J.**

1. Maharashtra town planning law has evolved, with a view to promote planned development and de-congest the highly congested areas, the imaginative concept of making, under certain circumstances, the development potential of a plot of land separable from the land itself and further letting the development rights to be transferable by the land owner. The provisions made for the development rights that arise from a piece of

land and yet acquire a separate and independent existence with the added flexibility of being transferable come very useful in case of plots of land shown in the Development Plan as reserved for some public purpose or amenity that prohibits their owners from developing those plots by making any other kind of construction. In such circumstances it is open to the landowner to surrender the plot of land free of cost (and free from all encumbrances) to the municipal authorities who may acquire the land by granting to the landowner Floor Space Index or Transferable Development Rights against the area of the surrendered land. The law further provides for additional Floor Space Index or Transferable Development Rights against the development or construction of amenities (for which the plot is shown reserved in the plan) by the owner at his own cost.

2. The appellants and the petitioners in this batch of appeals and writ petition had their plots of land shown in the Development Plan as reserved for roads. They voluntarily surrendered their lands. In addition, they constructed on their respective pieces of land the Development Plan roads at their own cost and as per the specifications stipulated in the relevant rules. There is no dispute between the parties in regard to the Floor Space Index or Transferable Development Rights granted to them for the surrendered pieces of land. But the parties are in serious controversy over the extent of

Floor Space Index or Transferable Development Rights for the roads constructed on the surrendered lands at the owners' cost. The landowners claim that for constructing the roads they are entitled to Floor Space Index or Transferable Development Rights for the whole of the surface area of the roads. In support of their claim they rely upon paragraph 6 of Appendix VII to the Development Control Regulations for Greater Bombay, 1991 that provides for, '...a further DR in the form of FSI *equivalent to the area* of the construction/development done by him (landowner).....'. The municipal authorities would, however, grant them additional Transferable Development Rights only to the extent of 15% of the road area. The stand of the municipal authorities is based on a circular dated April 9, 1996 issued by the Municipal Commissioner, Municipal Corporation of Greater Bombay. The circular envisages a graded scheme for grant of Additional Development Rights for construction of amenities by the landowner, e.g., in case of amenities like general hospital, municipal primary school etc. it allows FSI equal to the built up area of the structure but in case of DP road only 15% of the area of the road surface. On behalf of the landowners it is argued that the contents of the circular are no more than executive instructions and can not supersede or override the provisions of the Regulations which are legislative in nature; in any event the circular would

only operate prospectively and have no bearing on the cases in hand since it was issued after the appellants and the petitioners had surrendered their plots of lands after constructing roads on those lands as required by the authorities. The argument is sought to be repelled on behalf of the state and the municipal authorities by taking the position that the law provides for grant of additional Floor Space Index or Transferable Development Rights commensurate to the *value* of the amenity constructed by the landowner and the meaning of paragraph 6 of Appendix VII to the Regulations will be clear by reading it along with the other provisions of the Regulations and the parent Act. Seen thus the circular dated April 9, 1996 would appear to be merely clarificatory and fully apply to the claims of the appellants and the petitioners. On behalf of the Municipal Corporation the claims of the appellants and the petitioners are also resisted on certain grounds of facts that we shall consider in due course.

3. This is the parameter of the dispute between the parties.

4. At this point it will be useful to refer to some of the provisions of the Maharashtra Regional and Town Planning Act, 1966 (the Act) and the Development Control Regulations for Greater Bombay, 1991 (the Regulations).

5. Section 2 of the Act contains the definitions. Sub-section (2) defines “Amenity” very widely to cover vastly different public utilities from hospitals, secondary schools and colleges to roads, streets and open spaces etc.. Section 2 (2) of the Act is as under:

“(2) “amenity” means roads, streets, open spaces, parks recreational grounds, play grounds, sports complex, parade grounds, gardens, markets, parking lots, primary and secondary schools and colleges and polytechnics, clinics, dispensaries and hospitals, water supply, electricity supply, street lighting, sewerage, drainage, public works and includes other utilities, services and conveniences;”

6. Sub-section 7 defines ‘Development’ and sub-section 9A defines ‘Development Right’ as follows:

“9A. “Development Right” means right to carry out development or to develop the land or building or both *and shall include the transferable development right in the form of right to utilise the Floor Space Index of land utilizable either on the remainder of the land partially reserved for a public purpose or elsewhere*, as the final Development Control Regulations in this behalf provide;  
(italics supplied)”

Sub-section 9 defines ‘Development Plan’ to mean a plan for the development or re-development of the area within the jurisdiction of a Planning Authority and includes revision of a Development Plan and proposals of special planning authority for the development of land within its jurisdiction.

7. Sub-section 13A defines 'Floor Space Index' as follows:  
"13 A. "Floor Space Index" means the quotient or the ratio of the combined gross floor area to the total area of the plot, viz.:  
Floor Space Index = 
$$\frac{\text{Total covered area of all floor}}{\text{Plot area;}}$$
"
8. Sub-section 15 defines 'Local Authority' and expressly mentions, amongst others, the Bombay Municipal Corporation constituted under the Bombay Municipal Corporation Act.
9. Sub-section 19 defines 'Planning Authority' to mean a Local Authority apart from certain other bodies.
10. Sub-section 23 to 26 define 'Region', 'Regional Board', 'Regional Plan' and 'Regional Planning Committee' respectively;
11. Sub-section 27 defines 'Regulation' to mean a regulation made under Section 159 of the Act and includes zoning, special development control regulation and other regulations made as part of Regional Plan, Development Plan or town planning scheme.
12. Chapter II of the Act contains the provisions relating to Regional Plan under sections 3 to 20. In this group of cases, however, we are concerned with the Regulations forming part of a Development Plan which is dealt with under sections 21 to 42 in Chapter III of the Act. Section 21 obliges

every Planning Authority to prepare a draft Development Plan for the area within its jurisdiction subject to the provisions of the Act and in accordance with the provisions of a Regional Plan, where there is such a plan. Section 22 deals with the contents of the 'Development Plan'. It mandates that the Development Plans would generally indicate the manner in which the use of land in the area of the Planning Authority is to be regulated and the development of land therein is to be carried out. Further, the Development Plan would provide for, in particular the proposals for allocating the use of land for purposes, such as residential, industrial, commercial, agricultural, and recreational. It would also contain proposals for designation of lands for many different kinds of public purposes enumerated in clauses (b) to (l) of the section. As per clause (m) of the section the Development Plan would also provide for the provisions for grant of permission for controlling and regulating the use and development of land within the jurisdiction of a local authority and the matters connected therewith.

13. Section 22A enumerates what is meant by modification of a substantial nature in the Development Plan. Sections 23 to 31 lay down the procedure for making Development Plan, including Development Control Regulations by the Planning Authority after inviting objections and submitting draft plans to the State Government. Section 31 empowers the

State Government to sanction the draft Development Plan submitted by the Planning Authority. Section 37 deals with modification of final Development Plan. Chapter VII of the Act deals with Land Acquisition and section 125 provides that any land required, reserved or designated in a Regional Plan, Development Plan or Town Planning Scheme for a public purpose or purposes including plans for any area of comprehensive development or for any new town would be deemed to be land needed for a public purpose within the meaning of Land Acquisition Act, 1894. Section 126 lays down three modes for acquisition of land required for public purposes specified in the plans. The provisions of this section are important for the cases in hand and are reproduced below in so far as relevant for the present:

“126. (1) When after the publication of a draft Regional Plan, a Development or any other plan or town planning scheme, any land is required or reserved for any of the public purposes specified in any plan or scheme under this Act at any time the Planning Authority, Development Authority, or as the case may be, any Appropriate Authority may, except as otherwise provided in Section 113A acquire the land,-

(a) by agreement by paying an amount agreed to, or

(b) *in lieu of any such amount, by granting the land-owner or the lessee, subject, however, to the lessee paying the lessor or depositing with the Planning Authority, Development Authority or Appropriate Authority, as the case may be, for payment to the lessor, an amount*

equivalent to the value of the lessor's interest to be determined by any of the said Authorities concerned on the basis of the principles laid down in the Land Acquisition Act, 1894 *Floor Space Index (FSI) or Transferable Development Rights (TDR) against the area of land surrendered free of cost and free from all encumbrances, and also further additional Floor Space Index or Transferable Development Rights against the development or construction of the amenity on the surrendered land at his cost, as the Final Development Control Regulations prepared in this behalf provide*, or

(emphasis added)

(c) by making an application to the State Government for acquiring such land under the Land Acquisition Act, 1894, and the land (together with the amenity, if any, so developed or constructed) so acquired by agreement or by grant of Floor Space Index or additional Floor Space Index, or Transferable Development Rights under this sections or under the Land Acquisition Act, 1894, as the case may be, shall vest absolutely free from all encumbrances in the Planning Authority, Development Authority, or as the case may be, any Appropriate Authority,

(2) to (4) .... .... .... ....”

14. Section 154 of the Act obliges every Regional Board, Planning Authority and Development Authority to carry out such directions or instructions as may be issued from time to time by the State Government for the efficient administration of this Act. Section 158 contains the rule making powers and authorizes the State Government to make rules to carry out all or any of the purposes of the Act. Section 159 provides that any

Regional Board, Planning Authority or Development Authority may with the previous approval of the State Government make regulations consistent with the Act and the rules made thereunder.

15. The Municipal Corporation of Greater Bombay which is a Planning Authority under section 2(19) of the Act prepared a revised Development Plan and on April 30, 1985 submitted the Revised Draft Building bye-laws and Development Control Rules to the State Government as required under section 30(1) of the Act. The Development Control Rules, after being subjected to the procedure prescribed by law finally received the sanction of the State Government on March 25, 1991 and came into force from that date under the name, 'The Development Control Regulations for Greater Bombay'.

16. Before proceeding to examine the relevant provisions of the Regulations it may be noted that on the date on which the Regulations came into force certain amendments were introduced in the Act as well. Some of the amendments made in the Act with effect from March 25, 1991 include the definition of 'Amenity' in its present form that was substituted for the original definition of the term and the insertion of the definition of 'Development Right' as sub-section (9A) of section 2. Another very important amendment made in the Act was the insertion of clause (b) in

section 126(1) of the Act. Before March 25, 1991, section 126 of the Act provided for Acquisition of Land only by two means, one by payment of an amount agreed upon by the parties and the other by following the procedure under the Land Acquisition Act, 1894. The introduction of clause (b) in section 126(1) provided for a third mode for land acquisition that is based on the concept of Transferable Development Rights against the area of land surrendered free of cost and free from all encumbrances and a further Additional Floor Space Index or Transferable Development Rights against the development or constructions of the amenity on the surrendered land by the land owner (or the lessee) at his own cost. On behalf of the appellants and the petitioners it is argued that apart from section 2(9A) and clause (b) of section 126 (1), there is no other provision in the Act dealing with the concept of Transferable Development Rights and those two provisions were introduced in the Act on the same day the Regulations came into force in order to give effect to the concept of Transferable Development Rights evolved in the Regulations.

17. Coming back to the provisions of the Development Control Regulations for Greater Bombay, regulation 2(2) provides that any terms and expressions not defined in the Regulations shall have the same meaning as in the Act or the Bombay Municipal Corporation Act, 1888 and the rules

and bye-laws framed thereunder, as the case may be, unless the context otherwise required. Regulation 3 contains the definitions and clause (7) defines ‘amenity’ as under:

“Amenity means roads, streets, open spaces, parks recreational grounds, play grounds, gardens, water supply, electric supply, street lighting, sewerage, drainage, public works and other utilities, services and conveniences”.

18. It is to be noted here that the definition of ‘amenity’ under the Regulations is much restricted than the one given under the Act and under the Regulations ‘sport complex, parade grounds, gardens, markets, parking lots, primary and secondary schools and colleges and polytechnics, clinics, dispensaries and hospitals’ are not expressly included in the definition of amenity.

19. ‘Road’ indeed is common to the definitions both under the Act and the Regulations and in clause (76) of regulation 3 it is defined in the widest possible terms.

Regulation 3 (42) defines Floor Space Index as follows:-

“(42) Floor space index (FSI)” means the quotient of the ratio of the combined gross floor area of all floors, excepting areas specifically exempted under these Regulations to the total area of the plot, viz.:

$$\text{Floor Space Index (FSI)} = \frac{\text{Total covered area on all floors}}{\text{Plot area}}$$

20. Regulation 32 deals with Floor Space Indices and Tenement Density and provides for different Floor Space Indices for different areas in Greater Bombay. Regulation 33 provides for Additional Floor Space Index that may be allowed to certain categories. Regulation 34 contains the concept of Transferable Development Rights and it reads as follows:-

“34. Transfer of Development Rights. – In certain circumstances, the development potential of a plot of land may be separated from the land itself and may be made available to the owner of the land in the form of Transferable Development (TDR). These Rights may be made available and be subject to the Regulations in Appendix VII hereto”.

21. Regulation 35 provides for the method of computation of Floor Space Index.

22. Regulation 62 empowers the State Government to interpret the Regulations in the event of any dispute between the Municipal Corporation and an aggrieved party. Regulation 63 empowers the Commissioner to delegate functions which he is empowered to discharge to other subordinate officers. Regulation 64 provides for discretionary power of the Commissioner which can be exercised in the event of any hardship.

23. Appendix VII, referred to in regulation 34, lays down the manner for the grant of Transferable Development Rights to owners/ developers and the

conditions for the grant of such rights. The claim of the appellants and the petitioners are fully based on the provisions of Appendix VII, hence, those provisions, in so far as relevant for the present, are reproduced below:

“APPENDIX VII  
(Regulation 34)

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

1. The owner (or lessee) of a plot of land which is reserved for a public purpose in the development plan and for additional amenities deemed to be reservations provided in accordance with these Regulations, excepting in the case of an existing or retention user or any required compulsory or recreational open space, shall be eligible for the award of Transferable Development Rights (TDRs) in the form of Floor Space Index (FSI) to the extent and on the conditions set out below. Such award will entitle the owner of the land to FSI in the form of a Development Rights Certificate (DRC) which he may use himself or transfer to any other person.
2. Subject to the Regulation 1 above, where a plot of land is reserved for any purpose specified in section 22 of Maharashtra Regional and Town Planning Act, 1966, the owner will be eligible for Development Rights (DR's) to the extent stipulated in Regulations 5 and 6 in this Appendix had the land been not so reserved, after the said land is surrendered free of cost as stipulated in Regulation 5 in this Appendix, and after completion of the development or construction as in Regulation in this Appendix if he undertakes the same.
3. Development Rights (DRs) will be granted to an owner or a lessee only for reserved lands which are retainable/non-retainable under the Urban Land (Ceiling and Regulations) Act, 1976, and in respect of all other reserved lands to which the provisions of the aforesaid

Act do not apply, and on production of a certificate to this effect from the Competent Authority under that Act before a Development Right is granted. In the case of non-retainable lands, the grant of Development Rights shall be to such extent and subject to such conditions as Government may specify. Development Rights (DRs) are available only in cases where development of a reservation has not been implemented i.e. TDRs will be available only for prospective development of reservations.

4. Development Rights Certificates (DRCs) will be issued by the Commissioner himself. They will state, in figures and in words, the FSI credit in square meters of the built-up area to which the owner or lessee of the said reserved plot is entitled, the place and user zone in which the DRs are earned and the areas in which such credit may be utilized.
5. The built-up area for the purpose of FSI credit in the form of a DRC *shall be equal to the gross area of the reserved plot to be surrendered* and will proportionately increase or decrease according to the permissible FSI of the zone where from the TDR has originated.
6. **When an owner or lessee also develops or constructs the amenity on the surrendered plot at his cost** subject to such stipulations as may be prescribed by the Commissioner or the appropriate authority, as the case may be and to their satisfaction and hands over the said developed/constructed amenity to the Commissioner/appropriate authority, free of cost, he may be granted by the Commissioner **a further DR in the form of FSI equivalent to the area of the construction/development** done by him utilization of which etc. will be subject to the Regulations contained in this Appendix.

(emphasis added)

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

8. to 19. .... .... .... .... ....”

24. In light of the provisions of the Act and the Regulations the case of the appellants and the petitioners is plain and simple. Mr. Ashok Desai learned Senior Counsel appearing on behalf of the appellants submitted that the law clearly envisaged grant of FSI or TDR under two separate heads, one, for the land and the other for the construction of the amenity for which the land is designated in the Development Plan, at the cost of the owner. Section 2(9A) defined ‘Development Right’ to include the transferable development right and section 126(1) (b) provided for the grant of FSI or TDR against the area of land surrendered free of cost and further additional FSI or TDR against the development or construction of the amenity on the surrendered land at the owner’s cost as the final Development Control Regulation should provide. Mr. Desai further submitted that the extent of FSI or TDR for the land would be equal to the gross area of the surrendered plot and the extent of FSI or TDR for construction of the amenity for which the land was designated in the final Development Plan would be equivalent to the area of construction/development made on the land. Regulation 34

made provisions for transferability of development rights and Appendix VII referred to in regulation 34 provided for the extent of FSI or DRT admissible under the two heads. Paragraph 5 of Appendix VII that related to the surrender of the land provided for FSI credit in the form of a development right certificate 'equal to the gross area of the reserved plot'. Paragraph 6 of the Appendix VII that dealt with the additional DR for construction of the amenity for which the surrendered plot was designated in the Development Plan at the owner's cost provided for a further DR in the form of FSI '*equivalent to the area* of the construction/ development' made on the surrendered land. Mr. Desai contended that paragraph 6 of Appendix VII used the words 'equivalent to the *area* of construction/development' which was capable of only one meaning, that is to say, the additional DR would be the same in area as the amenity constructed/developed on the surrendered land. Mr. Desai further pointed out that no provision of Appendix VII, much less paragraph 6 of the Appendix made any distinction between the different amenities as defined under the Act or the Regulations and there was not the slightest hint or suggestion for grant of additional TDR on a variable and sliding scale for construction/development of different kinds of amenities on the surrendered land. Learned counsel submitted that the additional TDR permissible under

the statutory Regulations could not be reduced or curtailed on the basis of the circular issued by the Municipal Commissioner.

25. Here it would be appropriate to take a look at the circular dated April 9, 1996 issued under the hand of the Municipal Commissioner, Municipal Corporation of Greater Bombay. It deals with the grant of additional development rights in lieu of construction of amenities as per the provisions of regulation 34 read with paragraph 6 of Appendix VII of the Regulations. It was apparently issued on the basis of the decision arrived at in a meeting held on June 17, 1994 in which representatives of various bodies were present and in which after considering the various aspects such as *cost of construction of amenity, category of reservation etc.* a scheme was formulated for grant of additional development right in lieu of various constructed amenities on a graded basis. The circular provides that 100% FSI (Built up area) would be granted for the following buildable reservations:

- |                               |                            |
|-------------------------------|----------------------------|
| a] Municipal Transport Garage | b] General Hospital        |
| c] Fire Station               | d] Auditorium              |
| e] Electrical Crematorium     | f] Municipal Workshop      |
| g] Municipal Primary School   | h] Municipal Retail Market |
| i] Town Duty Office           | j] Office Building”        |

Paragraph III of the circular deals with construction of DP roads etc. with which we are directly concerned in this group of cases, and in so far as relevant for the present, provides as under.

“3. CONSTRUCTION OF DP ROADS, WIDENING OF EXISTING ROADS ETC.”

i] Additional Development Right *equivalent to 15% area of DP Road* constructed by the Owner of the land as per the Municipal specifications which includes provisions of SWDs, footpaths, Central verge, dividers, providing street lights, laying water mains and sewer lines etc. shall be considered.”

ii to viii] ..... ”

26. Later on, it appears, it came to the notice of the municipal authorities and the State Government that the matter was taken to the Court where the circular dated April 9, 1996 was challenged and claim was made for additional Development Right equal to the area of the road constructed on the surrendered plot of land. The extent of the additional Development Right for construction of DP roads was then increased from 15% to 25% of the area of the road by circular dated April 5, 2003, the relevant parts of which are as follows:

“Under the circumstances, the quantum of addl. TDR for construction of roads/setback lands to be granted to owners/developer of DP Roads/setback lands is being

enhanced from 15% to 25% for all prospective cases which are not covered under litigation”

And

“In cases where owners have filed writ petition which is pending in the Court, the additional TDR will be granted as per the orders of the Court. However in case these owners are agreeable to accept 25% additional TDR, the same can be considered after withdrawal of the Writ Petition filed by them in the Court”

27. Mr. Desai submitted that in *Pune Municipal Corporation and Anr. V. Promoters and Builders Association & Anr.* (2004) 10 SCC 796 this Court held that the Development Control Rules framed under the Maharashtra Regional and Town Planning Act, 1966 had statutory force. On the other hand the circulars issued by the Municipal Commissioner were simply executive instructions. The circulars, therefore, could not override or supersede the provisions of the Regulations. He further submitted that the municipal authorities too were fully aware and conscious of this legal position and had accordingly requested the State Government vide letter dated July 19, 1997 to suitably modify paragraph 6 of Appendix VII of the Regulations. Mr. Desai further submitted that the circular dated April 9, 1996 on the basis of which the appellant was being denied additional FSI or TDR equal in area to the road constructed on the surrendered plot was issued subsequent to the surrender of the land after construction of the road

on it. In any event, therefore, the circular would not affect the appellant's right as it would operate only prospectively and not retrospectively.

28. Mr. Naphade, learned Senior Counsel appearing for the State of Maharashtra, countered the claim of the appellants and the petitioners by submitting that the circulars simply made clear the position that was implicit in the statutory provisions and would be clearly discernable on reading paragraph 6 of Appendix VII to the Regulations along with other relevant provisions. Apart from clarifying the statutory position, by introducing a graded scheme for grant of additional FSI or TDR the circular eliminated the possibility of any discriminatory or arbitrary action on the part of the authority competent to issue the development right certificate. The submission of Mr. Naphade is based on the premise that the law contemplated grant of further additional TDR commensurate to the **value** of the amenity constructed/developed on the surrendered land. Learned counsel pointed out that the definition of amenity covered vastly different public utilities like a school building or a road or even an open space. He further submitted that though both a single storied school building and a road built on plots of land equal in area may have more or less the same carpet area, the cost of construction of the school building will be much higher than the road. Hence, the grant of additional TDR for construction of

all the different kinds of amenities equal to the area of the construction would be illogical, unreasonable and discriminatory. Further, in case the graded system was not followed it would be left in the hands of authority competent to issue the development right certificate to give additional FSI or TDR on a subjective basis. The circular, by introducing a graded scheme eliminated the subjective element and closed any possibility of arbitrary and discriminatory action on the part of the authority. Coming back to the basic argument that under the law the grant of additional TDR could only be commensurate to the value of the amenity constructed/developed on the surrendered land and not necessarily equal in area of the construction/development Mr. Naphade submitted that paragraph 6 of Appendix VII, unlike paragraph 5 didn't use the words '**equal** to the gross area of the reserved plot' or 'equal in area'. Instead, paragraph 6 used the words '**equivalent** to the area of construction/development'. He further submitted that paragraph 6 of Appendix VII to the Regulations must be read with Section 126(1) (b), the relevant provision in the parent Act and paragraph 6 of Appendix VII must be controlled and must take its meaning from the provision of that section. Section 126(1) (b) used the words '**against** the area of the land surrendered' and '**against** the development or construction of amenity on the surrendered land'

29. Seen thus, Mr. Naphade argued, it would be clear that the law provided for the grant of additional Development right proportionate to the value of the amenity constructed by the owner at his own cost. The circulars issued by the Municipal Commissioner simply quantified the exchange value of the different kinds of amenities in percentage terms depending upon their costs of construction and other relevant considerations.

30. The Bombay High Court accepted the line of argument advanced by Mr. Naphade and in the judgment coming under appeal it observed as follows:

“18. The terms used in a statute are to be read and understood in the context in which they are used in the relevant provision. The term “equivalent” in the said Clause is undoubtedly related to the area and the term “area” relates to the construction or development of the amenity done in the surrendered plot. The word “area” therein does not refer to that of the area of the plot. The term “equivalence” is defined in the Black’s Law Dictionary to mean “equal in value, force, measure, volume, power and effect or having equal or corresponding import, meaning or significance; alike; identical.” The equivalence in case of construction activity cannot be ascertained by merely referring to the carpet area of the land occupied by the construction but it has to take into consideration the total quantity as well as the quality of the construction. The term “quantity” would refer to the total area of construction, not only on the ground of the land but it would include even the upper floors of construction. The quality of construction would include the description as well as the type of construction i.e. whether it is road or building or shed, etc., as well as of what material. The area of construction would obviously refer to its total area of the structure and when it relates to a building erected

on a land, it would not only include the carpet area of the land occupied by such building but the total area of the super-structure and the same will have to be considered to ascertain the FSI and consequently the value of such total area of the construction would be the determining factor in that regard. It is also to be noted that the term “FSI” i.e. floor space index means and has been defined under the clause 2 (42) of the said Regulations as the quotient of the ratio of the combined gross floor area of all floors, excepting areas specifically exempted under the said Regulations, to the total area of the plot, viz., floor space index is equal to the total covered area of all the floors divided by the plot area. Therefore the total expenditure incurred in the construction or development of amenity in the surrendered plot assumes importance while determining the entitlement of the owner or the developer for further DR in the form of FSI on that count under Clause 6 of Appendix VII.

19. As rightly submitted on behalf of the respondents, the differentiation in the percentage is directly linked to the value of the area of the construction or the development carried out in relation to the amenities in the surrendered plot. Certainly the valuation of the construction of a road in a specified area cannot be equated with that of the value of construction in relation to a building occupying the same measure of area of land. There is bound to be a substantial difference between the value of the road built in an area of land and that of the building constructed in same measure of area of land. In case of road, the construction lies merely on the carpet area of the land. In case of building, the construction is not only on the carpet area of the land but it goes vertically above depending upon the number of its floors. In other words, while the road would occupy the ground as many times as the number of floors it will have. Being so, the area of land occupied by the construction or development of a road cannot be equivalent to the same area of the land occupied by the construction of a building. Considering this important aspect of the matter, the authorities having decided to grant the FSI on the basis of

the value of the area occupied by construction or development of amenity in the surrendered plot which would depend upon the prevailing rate of the cost of the construction or the development. The same cannot be found fault with.”

31. We are unable to agree with the view taken by the Bombay High Court and to accept the submissions of Mr. Naphade because it seems to us to do violence to the plain language of the statute.

32. Section 126 (1) (b) of the Act uses the word ‘**against**’: it speaks of granting FSI or TDR ‘**against** the area of land surrendered’ and further additional FSI or TDR ‘**against** the development or construction of amenities on the surrendered land’. Now, one of the meanings of the word ‘against’ is given as “in return of something”, e.g., the exchange rate against Franc” (CHAMBERS 21<sup>st</sup> Century Dictionary, 1<sup>st</sup> Published in India 1997 reprinted 1999).

33. Webster’s third New International Dictionary gives the meaning of the word ‘against’ as “in exchange for: in return for”

34. The Concise Oxford English Dictionary gives one of the meanings of the word as “in exchange for, in return for; as an equivalent or set-off for; in lieu of, instead of.”

35. Thus, on the basis of the language used in section 126(1) (b) it could be legitimately argued that what is contemplated is to recompense the land owner proportionate to the **value** of the development or construction of the amenity on the surrendered land. But the matter doesn't stop there. As seen above in Appendix VII to the Regulations paragraph 5 uses the words '**equal** to the gross area of reserved plot'. Therefore, in so far as the bare land is concerned there is no difficulty. Paragraph 6 of the Appendix, however, uses the words '**equivalent** to the area of the construction/development' and much argument is made on the meaning of the word equivalent.

36. Mr. Naphade cited before us the Black's law dictionary in which 'equivalent' as an adjective is defined as "equal in **value**, force, measure, volume, power, and effect or having equal or corresponding import, meaning or significance; alike, identical."

37. Chambers 21<sup>st</sup> Dictionary defines equivalent as "equal in **value**, power or meaning".

38. Concise Oxford English Dictionary defines the word as an adjective as "Equal in value, amount, function, meaning, etc. (equivalent to) having the same or a similar effect as".

39. New Webster's Dictionary defines equivalent as "Equal in value, measure, force, effect, or significance; corresponding in position or function;"

40. Webster's Third New International Dictionary defines it as an adjective as" 1: equal in force or amount ..... equal in area or volume but not admitting of superposition ( a square ~ to a triangle) 2 a: like in signification or import 3 a: equal in value : COMPENSATIVE.

41. "WORDS AND PHRASES Permanent Edition Vol.15 at p.157 defines 'equivalent' as follows:

"To be 'equivalent to' means to be equal in value, to be the same, corresponding to and to be worth. Desoe v. Desoe, 23 N. E. 2d 82, 83, 304 Mass. 231".

"The word "equivalent" has been defined to mean "equal in **value, area**, volume, force, meaning, or the like; synonym: alike, identical." Nahas v. Nahas, 90 P. 2d 223, 224, 59 Nev. 220"

42. The Advanced law Lexicon 3<sup>rd</sup> Edition 2005 Book 2 defines 'equivalent' as follows:

"Equal in worth or value. Equal in **value**, measure, force, effect etc. EQUIVALENT, EQUAL. Equal expresses the fact that two things agree in anything which is capable of degree, e.g., in quantity, quality, value, bulk, number, proportion, rate, rank, and the like. Equivalent is equal in such properties as affect ourselves or the use which we make of things, such as value, force, power, effect impact and the like (as) "Equivalent of money.""

43. The last of the above makes the meaning of the word ‘equivalent’ very clear by explaining it in contradistinction to the word ‘equal’. It says equivalent is equal in such **properties** as affect the use which we make of things. Seen thus any of the relevant properties, e.g., value, area, volume, quantity, quality etc. may form the basis for determining equivalence. Now, if the words in paragraph VI of schedule were to be “**equivalent to the construction/development**” then the submission of Mr. Naphade would have been fully acceptable as in that case it would be open to determine equivalence on the basis of value of the construction and not on any other basis. But the regulation fixes the measure of equivalence by using the words “equivalent to the **area** of construction/development done on the surrendered land”. ‘**Area**’ of construction/development having being fixed as the measure of equivalence it is no longer open to contend that any other basis such as value may be used for determining equivalence.

44. We may here make it clear that we fully appreciate the rationale behind trying to make value of the development/construction rather than its area as the basis to recompense the land owner and for granting the additional FSI or TDR. The submissions of Mr. Naphade in that regard are not without substance but that is not the law as it stands and the value of the

development/construction can only be made the basis for granting additional FSI or TDR by making suitable amendments in the law and not by an executive circular.

45. In regard to the circular there is something else too that we find quite curious. This aspect of the matter was not argued before us and it is not relevant for the present, nevertheless we would like to point it out as it may help the concerned authorities in future. It is to be noted that both section 126 (1)(b) of the Act and paragraph 6 of Appendix VII to the Regulations provide for additional FSI or TDR for construction or development of amenity which term is defined both in the Act and the Regulations. But in the circular dated April 9, 1996 100% FSI (built up area) is reserved for public utilities none of which is expressly mentioned in the definition of amenity in clause 3(7) of the Regulations. Furthermore 'Municipal Transport Garage', 'Fire Station', 'Auditorium', 'Electric Crematorium', 'Municipal Workshop', 'Town Duty Office' and 'Office Building' are not even covered by the definition of 'amenity' under section 2 (2) of the Act. It is highly debatable if those public utilities can be introduced through the circular as 'amenities' within the meaning of the Act or the Regulations.

46. Apart from the contention raised by Mr.Naphade, Mr. Shishodia Senior Advocate appearing for the Municipal Corporation, Greater Mumbai

resisted the claims of the appellants and the writ petitioners on certain other grounds. Mr. Shishodia submitted that for acquisition of the designated plot of land recourse to clause (b) of sub section (1) of Section 126 of the Act could only be taken by mutual agreement of the parties concerned. It was equally open to the municipal authorities not to accept the surrender of the land under clause (b) as it was open to the land owner to make the offer. Therefore, it followed according to him, that the municipal authorities could accept acquisition of the land in terms of clause (b) on certain conditions to which the land owner might or might not agree. In case the land owner did not agree to the condition(s) put by the municipal authority he would not surrender the land and then the acquisition of the land could take place either in terms of clause (a) or clause (c) of section 126 (1). Mr. Shishodia submitted that the appellants in all the cases had agreed to construct the road as part of the condition to surrender the land and getting 100% TDR in lieu of the land. According to him, since the construction of the road was a condition for grant of 100% TDR for the bare land the appellants and the petitioners were not entitled to claim any further TDR at all for construction of the roads by them. He further submitted that it was only indulgence shown to the appellants and the petitioners that the municipal authorities agreed to give them additional TDR to the extent of 15% of the road area

after the issuance of circular dated April 9, 1996 and 25% of the road area after the issuance of the circular dated April 5, 2003.

47. The submission of Mr. Shishodia is completely unacceptable. The conditions, that is to say, the mutual rights and obligations subject to which the land owner may offer to surrender the designated plot of land to municipal authority and the latter may accept the offer are enumerated in detail in the statutory provisions. Beyond those conditions there can be no negotiations for surrender of the land, particularly in derogation to the land owner's statutory rights. Having regard to the nature of the law the submission advanced on behalf of the municipal authority would lead to palpably unjust and inequitable results. The land owner whose land is designated in the development plan as reserved for any of the purposes enumerated in section 22 of the Act or for any of the amenities as defined under section 2(2) of the Act or regulation 2(7) of the Regulations is not left with many options and he does not have the same bargaining position as the municipal authority. Therefore, surrender of the land in terms of clause (b) of section 126(1) of the Act cannot be subjected to any further conditions than those already provided for in the statutory provisions. It is of course open to the legislature to add to the conditions provided for in the statute (or for that matter to do away with certain conditions that might be in existence)

But it certainly can not be left in the hands of the executive to impose conditions in addition to those in the statutes for accepting the offer to surrender the designated land.

48. Mr. Shishodia next submitted that the measure of 15% (later raised to 25%) of the area of the road constructed for grant of TDR by the impugned circulars of April 9, 1996, April 5, 2003 and May 5, 2004 was decided in meetings in which Mr. Nayan M. Shah, constituted attorney of the appellants was also present as the representative of the industry. Hence, it was no longer open to the appellants and the petitioners to question those circulars. We are once again unable to accept the submission, Mr. Shah might have been present in the meeting and he might or might not have voted for the graded scheme for grant of additional TDR but that would not authorise the municipal authorities to override or supersede the statutory provisions by issuing circulars in the nature of executive instructions.

49. In light of the discussions made above we find that the stand of municipal authorities is contrary to the law as it stands today and the view taken by High Court is unsustainable. The judgment and order dated October 18, 2005 passed by High Court of Bombay in W.P.(C) No.323 of 2000 and other analogous cases is accordingly set aside and the writ petitions are allowed.

50. In the result, the appeals and the writ petition are allowed but with no order as to costs.

.....J  
[Markandey Katju]

.....J  
[Aftab Alam]

New Delhi  
February 6, 2009.

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 2575 OF 2011

[ARISING OUT OF SLP (C) NO. 31645 OF 2009]

The Municipal Corporation of  
Greater Bombay & Anr.

... Appellants

Versus

Yeshwant Jagannath Vaity & Ors.

... Respondents

**J U D G M E N T**

**V.S. SIRPURKAR, J.**

1. Leave granted.

2. Whether the High Court was right in directing the appellant The Municipal Corporation of Greater Bombay (hereinafter called "the MCGB" for short) to grant additional transfer development rights (hereinafter called "TDR" for short) and to issue further development rights certificate (hereinafter called "DRC" for short) equivalent to 2646.14 sq. metres (85 % of the area of a courtyard) developed by the respondents in favour of the appellants is a question that fall for consideration in this appeal.

3. By the impugned judgment, the Bombay High Court under Clause 6 of Appendix VII to the Development Control Regulation for Greater Bombay, 1991 (hereinafter called "the Regulations" for short) has issued such a direction in a writ petition filed by the respondents herein.

### Factual panorama

4. The respondents herein owned 10,000 sq. yards of land in Mulund village. A development plan was sanctioned for Greater Bombay in the year 1957. Mulund comes within the area of Greater Bombay. The said land was shown as reserved for public purpose of construction of a godown. Ordinarily, such land is acquired under the provisions of Land Acquisition Act, 1894. However, the respondents and the four other co-owners entered into a private agreement to hand over possession of 10,000 sq. yards to the MCGB for the temporary use as a truck terminal. The land was also to be used as a town duty office. The possession was handed over on 18.9.1961. An agreement was entered into between the respondents and the other co-owners with the MCGB wherein it was agreed that the respondents and the other co-owners would receive compensation of Rs.90,000/-. The land, though, was given in possession much earlier and there was an agreement dated 16.12.1967, it was not put to any use much less for the public purpose for which it was intended to be acquired. The land was not put to any other use also right till November, 1998. Hence, the respondents filed a writ petition No.3437 of 1988 *inter alia* praying therein for a declaration that the land was not liable to be acquired. The writ petitioners demanded back the possession of 10,000 sq. yards. There was a compromise effected in this writ petition by order dated 10.3.1992 between the parties. Under the same, the MCGB agreed to acquire and retain the area of 3500 sq. metres for the purpose of establishing and constructing an export octroi office. The consent terms provided that appellant Nos.1 and 2, namely, MCGB and its Chief Engineer

would hand over the remaining area to the respondents herein and the respondents herein would refund the amount of Rs.90,000/- with interest therein @ 10 % per annum from the date of payment till the date of re-payment to the MCGB. It was further provided in the consent terms that the respondents herein would be entitled to TDR to the extent provided in the Regulations in respect of 3500 sq. metres in lieu of the payment of Rs.90,000/- with interest. It was further provided in the consent terms that the MCGB would grant TDR in lieu of the said land measuring 3500 sq. metres subject to the compliance of various requirements by the petitioners as required under Regulation 34, Appendix VII of the Regulations. It was specifically provided by Clause 9 of the consent terms that if the petitioners constructed and developed export office for the MCGB on the aforementioned area of 3500 sq. metres and handed over the premises to the MCGB free of cost, the respondents would be entitled to the benefit of additional transferable development rights as per Regulation 6 of Appendix VII. The precise wordings of Clause 9 to the consent terms are as under:

"9. The petitioners shall be entitled to the benefit of Additional Transferable Development Rights (hereinafter referred to as 'ATDR'), if the petitioners are asked by the respondent No.1 to construct and develop the Export Office for the Corporation on the land so surrendered at their own costs and as per the plans and designs and specifications of the respondent No.1 and hand over the premises so constructed to the respondent No1 free of costs as per the sub-regulation 6 of Appendix VII of the Development Control Rules for Greater Bombay, 1991."

5. A letter was addressed by the Constituted Attorney of the respondents dated 18.4.1992 calling for a joint survey and demarcation and the engineer of the MCGB was requested to

inform the details and specifications of the work which the present respondents would have to carry on to claim the TDR as per paragraph 4 of the consent terms and the additional TDR as per paragraph 9 of the consent order quoted above. The respondents were informed on 25.4.1992 that they would have to carry out the work of leveling the plots, construction of compound wall on three sides with gates, development of yard with asphaltting and the construction of an export office building as per the specifications submitted by the Deputy C.E.(P & D)/ Municipal Architect by his communication dated 20.9.1991. The Constituted Attorney was directed to approach the concerned authority.

On 25.5.1992, the Architect of the respondents made an application to the MCGB for grant of TDR in respect of 3500 sq. metres of area already surrendered by the respondents to appellant No.1. The petitioners also paid the sum of Rs.3 lakh 15 thousand (principal amount of Rs.90,000/- and the interest @ 10 % per annum) from the date of payment till the date of re-payment as agreed to in the consent terms.

On 22.01.1993, the respondents addressed a letter to the Assessor and Collector asking for further details relating to the work to be carried out on the said 3500 sq. metres of land. On 5.3.1993 the Assessor and Collector of the appellant No. 1 herein addressed a letter to the respondents herein enclosing a sketch plan of for the proposed export office together with development of yard. It was informed in the said letter that as per the directions of the Municipal Commissioner, additional TDR in lieu of the development of

export yard and construction of office would be granted to the respondents. The respondents were also requested to expedite the work of construction of export office.

On 7.6.1993, a letter was addressed by Municipal Architect to the respondents herein enclosing specifications for asphaltting. It was mentioned that this work to be carried out under the supervision of Municipal engineer.

By a further letter dated 23.6.1993, the Chief Engineer informed the petitioners that the development right certificate would be issued after compliance with certain additional requirements contained in the said letter. On 13.9.1993, the respondents herein wrote a letter to the Assistant Engineer informing about the various compliances and requesting for issue of development right certificate in respect of 3500 sq. metres.

On 9.2.1994, it was informed by a letter that the respondents' right to grant development certificate would be considered after they complete the work of construction of the export office. Further on 22.2.1995, the Chief Engineer addressed a consent letter to the respondents certifying his no objection for constructing the export office building subject to the terms and conditions mentioned in the said letter. Condition Nos. 1 and 4 in the said letter are relevant for the issues involved. They are as under:-

- "1. That you will construct the Export Office building as per the plans & specifications of the Municipal Corporation enclosed herewith and the Municipal Corporation will grant the Transferable Development Rights equivalent to the builtup area of the Export Office.

4. That you will concrete/ asphalt the portion of the Export Office Yard around the Export Office building as per the specifications of MCGB and as given by the Chief Engineer (Roads & SWD) of the MCGB. The work will be carried out under the Municipal supervision and certified by the Competent Authority. The Municipal Corporation will grant the benefit of Transferable Development Right in respect of the concrete/asphalted surface area around the Export Office building as and when the quantum of such TDR is decided by the Municipal Commissioner."

**(emphasis supplied)**

6. The petitioners constructed the export office and also developed the surrounding area. The possession of the export office and the courtyard was handed over to the the MCGB for which a possession receipt was also issued. Possession receipt mentioned the details of the constructed amenity as under:-

"CTS No.137A Export Office Gr.FI.293.13 sq. Electric of village & chowky for m. 1<sup>st</sup> FI.170.15 fittings Mulund (East) octroi Deptt. sq.m. Exit. Fixtures as office 27.88 sq. advised by E.E.(Mech) & Water cooler- Total 491.16.sq.m.

CTS No.137A Court yard of Area as shown by Electric of village Export office A B C D E F G H poles and Mulund (East) office I JK on the plan carriage duly certified by entrance to Roads Deptt. under plot & front No.DYCHE/1486/compound/ Rds.dt.23.2.96 wall."

7. An application was made by the respondents' Architect for DRC. On 19.1.1999, DRC for TDR in respect of export office being 491.16 sq. metres equivalent of the 100 per cent of the built up area of the export office was granted. However, insofar as the additional transferable rights in lieu of the development of the export courtyard surrounding the export office was concerned, the same was restricted to 466.96 sq. metres being 15 per cent of the built up area of the courtyard. This was the first flash point. On 7.3.2000, the petitioners by their letter claimed that they were entitled to the additional transferable rights to the extent

of 3113 sq. metres as against the development of the courtyard of export office on which they had done the asphaltting work. On 27.6.2000, the Chief Engineer refused to grant further additional TDR contending therein that the TDR issued was in accordance with the BMC policy. Once again, a demand was made by communication dated 6.7.2000 for the balance area and also requested the MCGB for the particulars of the alleged policy. It was informed herein that there was a circular dated 9.12.1996 which formulated the policy. The respondents were invited for discussion. A contempt application was also filed by the respondents being Contempt Petition No.116 of 2000, contending therein that the consent order dated 10.3.1992 was violated. The said contempt petition was dismissed holding that there was no willful disobedience. On 23.12.2003, the respondents again addressed a letter to the MCGB calling them upon to grant further DRC for the remaining 85 per cent of the area of the courtyard and since the demand was not met, the writ petition came to be filed.

8. The writ petitioners-respondents mainly relied on the consent terms dated 10.3.1992 and, more particularly, on Clause 9 and contended that they were entitled to the benefit of additional TDRs as they had developed not only the export office of the MCGB but also done the asphaltting work of the surrounding area, more particularly, in accordance with the Regulations. Appendix VII, Sub-Clause 6 of Regulation 34 of the Regulations were also reiterated in the letter issued by the Chief Engineer dated 22.12.1992. Further condition No. 4 provided that the MCGB will grant benefit of transferable development rights in respect of the agreed asphalted surface area, the export office building as and

when the quantum of such TDR is decided by the Municipal Commissioner was also relied upon. They pointed out that the Municipal Commissioner could not have relied on a subsequent circular dated 9.12.1996 and had to go strictly by the language of Clause 6 of Appendix VII of Regulation 34 of the Regulations under which they were entitled for an area equivalent 100 per cent of the area of the courtyard which they had developed. In short, they pointed out that limiting that area only to 15 per cent and granting DCR only in respect of that much of area was wholly illegal.

9. On the other hand, it was contended on behalf of the appellants herein that Regulations 33 and 34 of the Regulations were only enabling provisions and did not create any legal right to get additional TDR. The appellant also relied on the circular dated 9.12.1996 and it was contended that as per this circular various amenities were described where 100 per cent FSI was admissible in respect of some amenities and in respect of others only 15 per cent of additional development rights could be admissible. It was mainly contended that the courtyard and the development therein did not amount to an amenity within the meaning of Section 2 (7) of the Regulations. The High Court allowed the writ petition. It was held that the Regulations had statutory force and Clause 6 of Appendix VII of Regulation 34 of the Regulations provided for benefit to be enjoyed by a person who constructed the amenity. Relying on the plain language of Clause 6, it was held that the respondents herein were entitled to 100 per cent DCR rights. The High Court also held that the aforementioned circular dated 9.4.1996 was of no consequence vis-

à-vis the specific language of Clause 6 of Appendix VII Regulation 34 of the Regulations. The High Court also relied on the judgment of this Court reported as **Godrej & Boyce Manufacturing Co. Ltd. v. State of Maharashtra & Ors.** [2009 (5) SCC 24]. The High Court came to the conclusion that the above mentioned decision of this Court applied on all fours to the present matter.

10. Shri Uday Lalit, learned senior counsel appearing on behalf of the appellants herein firstly contended that the above mentioned decision was distinguishable. According to him, in that decision the Court was considering whether a road constructed by the owner would entitle the owner to additional TDR. He further argued that the road was undoubtedly an amenity under Maharashtra Regional and Town Planning Act (hereinafter called "the Act" for short) as also under the Regulations. Learned counsel further argued that in the present case the additional TDR was being claimed on the basis of the work of asphaltting of the courtyard and, therefore, it could not be held to be an amenity entitling the owner to the additional TDR.

11. It was further submitted that the circular dated 9.4.1996 had no bearing in **Godrej & Boyce's case (cited supra)** since it was issued after the land owners had surrendered their plot of land after construction of the roads as required by the Municipal Council while in the present case the said circular was issued prior to the respondent Nos.1 and 3 completing the construction of an export office and asphaltting of the courtyard and handing over the possession. The counsel further urged that the question arising in the present case was different in the sense that in the present case, the question was whether under sub-regulation 6 of

Appendix VII of Regulation 34, it was mandatory for the Commissioner or the appropriate authority to grant 100 % TDR equivalent to the entire area of the courtyard. Lastly, it was contended that in **Godrej & Boyce's case**, the difference between Regulations 5 and 6 of Appendix VII was not noticed.

12. The learned senior counsel also urged that Clause 6 applied only to the developed or constructed amenity and asphaltting the courtyard could not be covered under the same. Our attention was drawn to the definition of 'amenity' and it was contended that the courtyard could not be covered under the same. The learned senior counsel further urged that the High Court had not properly interpreted the consent terms as also Clause 4 of the letter dated 22.2.1995. It was urged that that unlike sub-regulation 5, the wording in sub-regulation 6 confers a discretion on the authority. Our attention was drawn to the difference in language by contending that while in clause 5 the wording used is "*shall be equal to*" and in clause 6, the same was "*may be granted*". Our attention was also drawn to the phraseology used in the two clauses. While in clause 5, the wording used was "*equal*", in clause 6 it was "*equivalent*". It was also urged that by circular dated 9.4.1996, arbitrary exercise of discretion by the Commissioner was avoided and that was the main purpose of bringing in the circular. The same provided definite guidance in respect of the extent of TDR that was to be granted by the Commissioner /competent authority. Lastly, it was urged that asphaltting of the courtyard was a separate activity. It had got nothing to do with the consent terms. As regards the letter dated 22.2.1995, and more particularly, clause 4 therein, it was urged that under the same

the respondents had specifically agreed that the quantum of the TDR to be granted was to be decided by the Municipal Commissioner and, therefore, the respondents could not turn back and urge that they would be entitled to the 100% TDR.

13. As against this, Shri Ashok H. Desai, learned senior counsel appearing on behalf of the respondents pointed out that the matter was fully covered by the decision in the aforementioned case of **Godrej & Boyce (cited supra)**. The learned senior counsel pointed out that it was a misnomer to say that asphaltting was not an amenity. He pointed out that unless the asphaltting was done, the basic purpose of constructing the octroi duty office would have been frustrated as there would be no place for the large number of vehicles to be parked. The learned counsel also pointed out, relying on the provisions of DCR, that the courtyard, though was separately mentioned and explained in the Rules, the asphaltting therein would certainly be an amenity. The counsel urged about the letter dated 22.2.1995, that even if it was the discretion to decide about the quantum of grantable TDR, the said discretion could not have been used in contravention of the Regulations. He pointed out that on that date, the circular was nowhere which came much later and as such it could not have been made applicable with retrospective effect. The learned senior counsel also urged that the interpretation put forward by the appellants of Clauses 5 and 6 was incorrect and in fact there was very little or no difference. The learned senior counsel stressed the implication of Clause 6 and pointed out that there was no scope for the interpretation tried to be put forward by the appellant MCGB. Learned senior counsel wholly supported the High

Court judgment.

14. It will be our task to examine as to whether the aforementioned ruling in *Godrej & Boyce's case (cited supra)* clinches the issue. The factual scenario in both the matters is almost identical. The only difference is that in that case, the land owners had developed the roads while in the present case, the land owners have developed the courtyard by asphaltting the same. In *Godrej & Boyce's case (cited supra)*, the reliance was only on the same circular dated 9.4.1996 issued by the Municipal Commissioner of the MCGB. That was by far the only defence. In that case, the State had argued that the law provides for the grant of additional FSI or TDR commensurate to the value of the amenity constructed by the landowner and the meaning of Para 6 of Appendix VII to the Regulations would be clear by reading it alongwith other provisions of the Regulations and the parent Act. The State had argued that the said circular dated 9.4.1996 was clarificatory and fully applied to the claims of the appellants in that case which were even prior to the said circular being born. After taking the full resume of the provisions of the Act as also the Regulations, the Court went on to hold firstly that as per Regulation 2(2) of the Regulations, any terms and expressions not defined in the Regulations shall have the same meaning as in Bombay Municipal Corporations Act, 1888 and the Rules and Bye-laws framed thereunder, as the case may be, unless the context otherwise required. The Court then went on to hold that the term "amenity" which was defined under Regulation 3 Clause (7) was much restricted than the one given under the Act, inasmuch as the sport complex, parade grounds, gardens, markets, parking lots, primary

and secondary schools and colleges and polytechnics, clinics, dispensaries and hospitals were not included in the definition of "amenity". The Court, however, found that the road was common to definitions, both, under the Act and the Regulations and it was defined in the widest possible terms in Clause (76) of Regulation 3.

15. After considering the concepts like "floor spare index (FSI)", "Additional FSI" and "TDRs", the Court considered Appendix VII referred to in Regulation 34 of the Regulations, the Court then took the stock of the argument that the envisaged grant of FSI or TDR was under two separate heads, one, for the land and the other for the construction of the amenity for which the land was designated in the development plan, at the cost of the owner. The Court referred to Section 2(9-A), as also to Section 126(1)(b). Taking note of Para 6 of Appendix VII of the Regulations, the Court noted that the additional DR for construction of the amenity for which the surrendered plot was designated in the development plan at the owner's cost provided for a further DR in the form of FSI "equivalent to the area of the construction/development". The Court also noted the argument that this grant of additional DR could not be on a sliding scale for construction/development of different kinds of amenities on the surrendered land and thus, it could not be reduced or curtailed. After taking into consideration the circular dated 9.4.1996 and noting, particularly, para 3 thereof, the Court also noted that in that case, the earlier granted TDR @ 15% was increased to 25%. The Court also noted the further argument that the Regulations framed under the Act had statutory force as held in **Pune Municipal**

***Corporation Vs. Promoters and Builders Assn. [2004 (10) SCC 796].***

As against this, the circulars issued by the Municipal Commissioner were simply executive instructions and thus could not override or supersede the provisions of the Regulations. The Court also noted the argument that since the Municipal authorities were fully aware and conscious of this legal position, they had requested to the State Government to suitably modify Para 6 of Appendix VII of the Regulations. The non-retrospectivity of the circular dated 9.4.1996 was also noted.

16. All these arguments were tried to be countered in that case, basically on the ground that the grant of additional TDR for construction of all different kinds of amenities equal to the area of the construction was illogical, unreasonable and discriminatory. It was also urged that the law contemplated grant of further additional TDR commensurate to the value of the land constructed/developed on the surrendered land. This argument was specifically refuted. In the present case, Shri U.U. Lalit also tried to argue the same aspect that as against the value or the expenditure spent for asphaltting, the claim for TDR over the area would be an excessive claim if the values are to be compared. In short, the argument was that the value of asphaltting would be nothing in comparison to the claim of 100% TDR for the whole courtyard. The Court did not accept this proposition which was accepted by the Bombay High Court in that case. Relying on the language of Section 126(1)(b) and the use of the word "against" therein in respect of the area of the land surrendered and the further use of the word "against" in respect of the development or construction of amenities of the surrendered land, the Court held

that what was contemplated by law was to recompense the landowner. However, Para 5 of the Appendix VII to the Regulations used the words "equal to the gross area of reserved plot", and, therefore, there was no difficulty insofar as the bare land was concerned. The Court then went on to consider the effect of the words "equivalent to the area of the construction/development" in Para 6 of the Appendix and noted in paragraph 58 of the judgment to the effect that the argument on behalf of the Government, though not without substance, had to be rejected as it was not in keeping with the law as it stood and, therefore, the value of the development/construction could only be made the basis for granting additional FSI or TDR by making suitable amendments in the law and not by an executive circular. In short, the Court came to the conclusion that (1) construction of the road was undoubtedly an "amenity", (2) under the express language of Section 126(1)(b) read with Para 6 of the Appendix VII, the use of the word "equivalent" would entitle the owner of the building to 100% for the construction of an amenity at owner's cost, and (3) a subsequent circular would be of no consequence and would not have the effect of overriding the provisions of the Regulations as envisaged in Appendix VII and clauses 5 and 6.

17. In view of this unequivocal declaration of law by this Court in the aforementioned case of **Godrej & Boyce (cited supra)**, in fact, law seems to be fully settled against the appellants. It is, however, argued that asphaltting of the courtyard could not be said to be an "amenity". The argument must fail as the very stance on the part of the MCGB to provide 15% of additional TDR for asphaltting the courtyard would contain an admission that

asphalting of the courtyard would amount to an amenity. Had it not been so, the MCGB could have conveniently said that it would not provide even 1% of additional TDR to the respondents herein. Further, considering the definition of "amenity" under Regulation 3(7) of the Regulations, which includes open spaces, parks, recreational grounds, play grounds etc., we have no difficulty in holding that asphalting the courtyard would certainly amount to an amenity. The building offered to be constructed by the respondents herein was an export office. Considering the overall situation prevailing in Mumbai, the asphalting of the whole courtyard and thus providing parking lot would certainly amount to an amenity. After all, the office, by its very nature, would attract trucks and other vehicles. In the absence of an asphalted large area, the office could possibly not be a feasible idea. On this count, the argument of the appellants must fail.

18. Shri U.U. Lalit, learned senior counsel appearing on behalf of the appellants then urged that the respondents herein had specifically agreed in the letter dated 22.2.1995 and more particularly in terms of para 4 thereof that the Municipal Corporation will grant the benefit of TDR in respect of the concrete/asphalted surface area around the Export Office building as and when the quantum of such TDR is decided by the Municipal Commissioner. It was very earnestly argued by the learned senior counsel that thereby the respondents had compromised their rights and had left it to the discretion of the Municipal Commissioner and, therefore, they could not turn around and say that it was not for the Municipal Commissioner then to decide the quantum as per his own discretion. The argument is clearly incorrect for the

simple reason that on the day when this letter was signed, the aforementioned circular dated 9.4.1996 was nowhere in existence. The respondents, therefore, had no reason to believe that the Municipal Commissioner would decide to scale down the entitlement which they legitimately expected because of clauses 5 and 6 in Appendix VII. The aforementioned letter merely provided that the quantum could be decided in terms of the area of courtyard to be developed and the grant of TDR would depend upon as to whether that much area was fully developed as per the satisfaction of the Municipal Commissioner. The scope of Para 4 could not be taken beyond this.

19. Shri Lalit, learned senior counsel, relying on clause 15, also argued that the land owner was to get the TDR only on the land being levelled to the surrendering ground level and a 1.5 metres high compound wall was constructed with a gate, at the cost of the owner. That may be so; however, in our view, the agreement on the part of respondents to construct such a compound wall and gate and to do the levelling of the land before handing over the land admeasuring 3500 sq. metres, would be of no consequence insofar as the present controversy is concerned. The further argument of the learned senior counsel about the difference in the phraseology in clauses 5 and 6 i.e. the word "equal" having been used in clause 5 and the word "equivalent" having been used in clause 6 would also be of no consequence as, in our opinion, the same has been concluded by the aforementioned ruling of this Court in **Godrej & Boyce's case (cited supra)** against the appellants, and, therefore, the argument that it gives a discretion to the Municipal authorities to scale down the grantable TDR, does not

impress us.

20. That apart, in the aforementioned ruling in **Godrej & Boyce's case (cited supra)**, the Court has clearly held that in a circular, the Corporation could not have created divisions in the total amenities in the sense that it could not have chosen to grant 100% of additional TDR in favour of some amenities and 15% in case of some others.

21. Shri Lalit, learned senior counsel has also reiterated the argument regarding the value of construction vis-à-vis the grant of TDR, which question, in our opinion, is not open in view of the unequivocal finding given on that question in the aforementioned ruling in **Godrej & Boyce's case (cited supra)**.

It was tried to be suggested that in asphaltting of the courtyard there was no element of development as, according to the learned senior counsel, the term "development" meant building, engineering, mining or other operations in, or over, or under land or the making of any material change in any building or land. The argument is wholly incorrect, as had this not been development, the MCGB would not have agreed to provide even 15% of the TDR therefor.

22. Lastly, Shri Lalit, learned senior counsel urged that the ruling in **Godrej & Boyce's case (cited supra)** was distinguishable inasmuch as under the said ruling what was considered was the construction of road which was not equivalent to asphaltting of a courtyard. We have already pointed out that the question was not of the construction of a road or asphaltting of a courtyard; the question was whether it was an amenity. Once it is held as an

amenity, there will be no question of refusing the right of equivalent TDR therefor. It was then urged that the circular dated 9.4.1996 in *Godrej & Boyce's case (cited supra)* was issued **after** the land owners had surrendered their plot of land and completed the construction of roads as required by the Municipal Corporation, whereas in the present matter, the circular was issued "**prior to**" completion of the construction of the export office by respondents 1 to 3 and asphaltting of the courtyard and handing over of the possession by them. In our opinion, this cannot be the distinguishable feature, as under any circumstance, the circular dated 9.4.1996 was issued much after the compromise in the writ petition and the issuance of letter of intent dated 22.2.1995.

23. No other point was urged before us.

24. We are, therefore, of the clear opinion that the High Court was right in allowing the writ petition and granting 100% TDR as against the development of courtyard by asphaltting the same. We find no merits in the appeal. The appeal is, therefore, dismissed. No costs.

.....J.  
(V.S. Sirpurkar)

.....J.  
(T.S. Thakur)

New Delhi;  
March 17, 2011.

**SUPREME COURT OF INDIA**



**JUDGMENT**

IN THE SUPREME COURT OF INDIA  
CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO.1748 OF 2015

MUNICIPAL CORP. OF GREATER MUMBAI AND ANR. . . . APPELLANT(S)

VERSUS

NATVAR PARIKH AND CO. PVT LTD. AND ANR . . . . RESPONDENT(S)

WITH

CIVIL APPEAL NO. 1749 OF 2015

O R D E R

Heard learned counsel for the parties.

There is no dispute that these appeals are fully covered by the decision of this Court in Godrej and Boyce Manufacturing Company Limited Vs. State of Maharashtra 2009 (5) SCC 24.

However, it is contended by learned counsel for the appellants that the decision should apply prospectively and not retrospectively. It is too late for us to re-visit the entire issue and take a decision whether the judgment delivered earlier should apply prospectively and not retrospectively. That is a matter that should have been agitated when Godrej and Boyce (supra) was being heard.

It is submitted that the public interest demands that the benefit of *Godrej and Boyce* (supra) should not be given to everybody as there are as many as

89 applicants who are waiting in the queue to take advantage of the decision rendered by this Court. It is not for us to comment one way or the other on the facts of cases that are not before us or to comment whether or not those applicants are entitled to the benefit of the decision. If any dispute arises in this regard, the appropriate Court will take a decision in the matter.

The civil appeals are dismissed.

.....J.  
[MADAN B. LOKUR]

NEW DELHI  
5TH MAY, 2016

.....J.  
[N.V. RAMANA]

ITEM NO.101

COURT NO.8

SECTION IX

S U P R E M E C O U R T O F I N D I A  
R E C O R D O F P R O C E E D I N G S

Civil Appeal No(s). 1748/2015

MUNICIPAL CORP. OF GREATER MUMBAI AND ANR.

Appellant(s)

VERSUS

NATVAR PARIKH AND CO. PVT LTD. AND ANR

Respondent(s)

(With office report)

WITH

C.A. No. 1749/2015

(With Office Report)

Date : 05/05/2016 These appeals were called on for hearing today.

CORAM :

HON'BLE MR. JUSTICE MADAN B. LOKUR

HON'BLE MR. JUSTICE N.V. RAMANA

For Appellant(s) Mr. R.P. Bhatt, Sr. Adv.  
Mrs. Jayashree Wad, Adv.  
Mr. Ashish Wad, Adv.  
Mr. P.V. Naik, Adv.  
Ms. Paromita Majumdar, Adv.  
Ms. Jaya Khanna, Adv.  
M/s. J. S. Wad & Co., Adv.

For Respondent(s) Mr. Kapil Sibal, Sr. Adv.  
Mr. Shyam Divan, Sr. Adv.  
Mr. Praveen Samdani, Sr. Adv.  
Mr. Mahesh Agarwal, Adv.  
Mr. Ankur Saigal, Adv.  
Mr. Satyendra Kumar, Adv.  
Mr. E. C. Agrawala, Adv.

Mr. Pravin K. Samdani, Sr. Adv.  
Mr. Kunal Vajani, Adv.  
Mr. Pranya Goyal, Adv.  
Mr. Aman Gandhi, Adv.  
Ms. Bindi Girish Dave, Adv.

UPON hearing the counsel the Court made the following  
O R D E R

The civil appeals are dismissed in terms of the signed  
order.

(Madhu Bala)  
Court Master

(Jaswinder Kaur)  
Court Master

(Signed order is placed on the file)

## IN THE HIGH COURT OF JUDICATURE AT BOMBAY

## CIVIL APPELLATE JURISDICTION

## WRIT PETITION NO. 4172 OF 2010

Shrikant H. Soni ...Petitioner

v/s.

Asst. Director  
Town Planning Authority  
for Nashik Municipal Corporation  
and ors.

...Respondents

Mr. Aspi Chinoy, Sr. Advocate with Mr. Tushar Sonawane and Mr. Nikhip Rajani i/b V. Deshpande & Co. for Petitioner.  
Mr. A. Y. Sakhare, Sr. Advocate with Mr. V. A. Gangal, Mr. Ashok Gade and Mr. C. K. Nirmale for Respondents Nos. 1 & 2.  
Mrs. Neha Bhide, AGP for Respondent No. 3.

CORAM: D. K. Deshmukh &  
Ranjit More, JJ

DATED: 20<sup>th</sup> July, 2011

P.C.:

1. By this petition the Petitioner claims a direction to the Respondent-Corporation to grant to the Petitioner amenity T.D.R. Under the Development Control Regulations.

2. The relevant facts are that, admittedly the land of the Petitioner was reserved for a Development Plan Road (D.P. road). The Petitioner admittedly has surrendered that land and has also paid the expenditure incurred by the Corporation for construction of

the road. Admittedly, the Petitioner has also been given the land T.D.R. For the land covered by the D.P.road. The Petitioner, thereafter, relying on the judgment of the Supreme Court in the case of Godrej and Boyce Manufacturing Co.Ltd. v/s. State of Maharashtra, 2009 SCC (5) 24 claimed amenity T.D.R. The Corporation refused to grant him amenity T.D.R. The principal reason why the Corporation declined to grant the amenity T.D.R. To the Petitioner is that the Petitioner had applied for sanction of lay out of his land. The land of the Petitioner where the Petitioner wanted to lay out the plot was accessed through the D.P.road from the same land. For grant of permission to the Petitioner to lay out the plot a condition was imposed that the Petitioner will surrender the land covered by the road free of costs and will also pay the costs of construction of the road. .

3. The defence of the Corporation is that because the Petitioner agreed to surrender the land covered by lay out road including D.P.road free of costs and also to bear the costs of construction of the road, the Petitioner cannot relying on the judgment of the Supreme Court referred to above and Development Control Regulations claim amenity T.D.R.

4. Perusal of the record shows that it is an admitted position that the part of the land of the Petitioner was affected by the D.P. Road. It is also an admitted position that the Petitioner has surrendered that land to the Corporation. The Corporation has admittedly has not paid any compensation to the Petitioner. The Petitioner admittedly has also paid the expenditure incurred by the Corporation for constructing the D.P. Road. It is also an admitted position that one of the conditions imposed by the Corporation for sanctioning the lay out of the plot submitted by the Petitioner was that the Petitioner will surrender the land under the road in the lay out free of costs and will also bear the costs of construction of the road. Perusal of the judgment of the Supreme Court in the case of Godrej and Boyce Manufacturing Co.Ltd. (supra), especially observations found in paragraphs 60 to 64, indicates that the Corporation cannot impose a condition that the owner will surrender the land which is covered by D.P. Road free of costs and shall construct the road without claiming any compensation from the Corporation. The observations of the Supreme Court from paragraphs 60 to 64 of that judgment are relevant. They read as under:

60. Apart from the contention raised by Mr.Naphade, Mr. Shishodia Senior Advocate appearing for the Municipal Corporation, Greater Mumbai resisted the claims

of the appellants and the writ petitioners on certain other grounds. Mr. Shishodia submitted that for acquisition of the designated plot of land recourse to clause (b) of sub section (1) of Section 126 of the Act could only be taken by mutual agreement of the parties concerned. It was equally open to the municipal authorities not to accept the surrender of the land under clause (b) as it was open to the land owner to make the offer. Therefore, it followed according to him, that the municipal authorities could accept acquisition of the land in terms of clause (b) on certain conditions to which the land owner might or might not agree. In case the land owner did not agree to the condition(s) put by the municipal authority he would not surrender the land and then the acquisition of the land could take place either in terms of clause (a) or clause (c) of section 126 (1).

61. Mr. Shishodia submitted that the appellants in all the cases had agreed to construct the road as part of the condition to surrender the land and getting 100% TDR in lieu of the land. According to him, since the construction of the road was a condition for grant of 100% TDR for the bare land the appellants and the petitioners were not entitled to claim any further TDR at all for construction of the roads by them.

62. Mr. Shishodia further submitted that it was only indulgence shown to the appellants and the petitioners that the municipal authorities agreed to give them additional TDR to the extent of 15% of the road area after the issuance of circular dated April 9, 1996 and 25% of the road area after the issuance of the circular dated April 5, 2003.

63. The submission of Mr. Shishodia is completely unacceptable. The conditions, that is to say, the mutual rights and obligations subject to which the land owner may offer to surrender the designated plot of land to municipal authority and the latter may accept the offer are enumerated in detail in the statutory provisions. Beyond those conditions there can be no negotiations for surrender of the land, particularly in derogation to the land owner's statutory rights.

64. Having regard to the nature of the law the submission advanced on behalf of the municipal authority would lead to palpably unjust and inequitable results. The land owner whose land is designated in the development plan as reserved for

any of the purposes enumerated in section 22 of the Act or for any of the amenities as defined under section 2(2) of the Act or regulation 2(7) of the Regulations is not left with many options and he does not have the same bargaining position as the municipal authority. Therefore, surrender of the land in terms of clause (b) of section 126(1) of the Act cannot be subjected to any further conditions than those already provided for in the statutory provisions. It is of course open to the legislature to add to the conditions provided for in the statute (or for that matter to do away with certain conditions that might be in existence) But it certainly can not be left in the hands of the executive to impose conditions in addition to those in the statutes for accepting the offer to surrender the designated land.

5. What is further pertinent to be noted is that the same Corporation has admittedly released the land T.D.R. in favour of the Petitioner. If, according to the Corporation because of the condition imposed in the letter sanctioning lay out the Petitioner had surrendered the land free of costs, then it is for the Corporation to explain why it released the land T.D.R. In favour of the Petitioner.

6. In our opinion, when the Corporation released the land T.D.R. to the Petitioner, it is clear because of the condition imposed in the order sanctioning the lay out, statutory rights which are acquired by the Petitioner under the Development Control Regulations cannot be denied to the Petitioner.

7. In the result, therefore, the petition succeeds and is allowed. Rule is made absolute in terms of prayer clauses (b) & (c).

8. The learned Counsel appearing for the Corporation states that the Corporation has committed a mistake in communicating the exact amount of expenditure incurred by the Corporation for construction of the D.P. Road. He submits that some additional amount is to be recovered from the Petitioner towards the construction costs of the D.P. Road.

9. In our opinion, as the Petitioner has admittedly paid the amount which was claimed by the Corporation, in case there is any additional amount which according to the Corporation is recoverable on that account, the Corporation shall be free to adopt such remedy as may be available to it under the law.

(RANJIT MORE, J.)

(D.K.DESHMUKH, J.)

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY**

**CIVIL APPELLATE JURISDICTION**

**WRIT PETITION NO. 9793 OF 2012**

Mangal Prabhat Lodha ... Petitioner.

V/s

State of Maharashtra  
and Others ..... Respondents.

**ALONGWITH  
WRIT PETITION NO.10526 OF 2012**

Lodha Novel Buildfarms  
Private Limited ..... Petitioner.

V/s

State of Maharashtra & Ors ..... Respondents.

**ALONGWITH  
WRIT PETITION NO.8306 OF 2012**

Shree Sainath Enterprises ..... Petitioner.

V/s

State of Maharashtra & Ors ..... Respondents.

Mr. Janak Dwarkadas, Senior Counsel with Mr. Milind Sathe, Senior Counsel, with Mr. Rahul Dwarkadas and Ms. Prachi Dharani i/b Wadia Ghandy & Co. for the Petitioners in all the three Petitions.

Mr. Jaydeep Deo, AGP for Respondent No.1 in all the three Petitions.

Mr. A.A. Kumbhakoni, Senior Counsel i/b Mr. A.R. Pitale for Respondent Nos. 2 and 3 in all the three Petitions.

**CORAM: V. M. KANADE &  
K. R. SHRIRAM, JJ.**

**DATE: 5<sup>th</sup> August, 2013**

**P.C.:- (Per V.M. Kanade, J.)**

1. Heard.
2. Rule. Rule is made returnable forthwith. Respondents waive service. By consent of parties matters are taken up for final hearing.
3. These three Petitions can be conveniently disposed of by a common order since the issue involved in these Petitions is identical.

4. Petitioners in these Petitions are aggrieved by the impugned orders dated 22/3/2012 and 4/9/2012 passed by Respondent No.3, respectively. Petitioners are also seeking an appropriate writ, order and direction, directing Respondent No.2 to revoke the impugned orders dated 22/3/2012 & 4/9/2012 passed by Respondent No.3 respectively and to further direct the Respondent No.2 to give additional TDR in the form of FSI equivalent to the area of DP Road constructed by the Petitioners at their cost as per the provisions of clause 6 of Appendix-W to DCR.

5. Brief facts which are relevant for the purpose of deciding these Petitions are as under:-

6. Petitioner in Writ Petition No.9793 of 2012 is a developer who intended to develop the property owned by him at village Majiwade, Sector-V in District Thane. A proposal accordingly was submitted to Respondent Nos. 2 and 4 for development of the said property. A portion of the property being area admeasuring 26254.17 sq. mtrs was reserved under the development plan for the purpose of construction of a road (hereinafter referred to as "DP Road"). The said proposal of development was approved by Respondent No.2 and the Commencement Certificate was issued in favour of the Petitioner. After complying with

necessary formalities, building was constructed and the land reserved for DP Road was handed over to Respondent No.2. Petitioner then by his letter dated 7/9/2010 requested Respondent No.2 to grant him additional TDS in terms of FSI equivalent to the area of DP Road constructed by him at his cost as per the provisions of clause 6 of Appendix-W to DCR. The said application was rejected by Respondent No.2 by order dated 23/9/2010. Thereafter, Petitioner filed a Writ Petition being Writ Petition No.450 of 2012 challenging the said order dated 23/9/2010. This Court, by its order dated 26/7/2012, set aside the impugned order. However, the matter was remanded to Respondent No.2 for taking a decision afresh in accordance with law. Thereafter, again, Respondent No.3 by order dated 4/9/2012 declined to grant additional TDR in the form of FSI equivalent to the area of DP Road (public amenity) constructed by the Petitioner.

7. So far as the Petitioner in Writ Petition No.10526 of 2012 is concerned, the facts are more or less similar. Petitioner in this case is the same Petitioner who has filed Writ Petition No. 9793/2012. In the third Writ Petition bearing No.8306 of 2012 also the facts are identical.

8. Petitioners' applications seeking TDR in the form of FSI equivalent to the area of DP Road surrendered to Respondent No.2 were dismissed by impugned orders dated

22/3/2012 and 4/9/2012.

9. Mr. Janak Dwarkadas, the learned Senior Counsel appearing on behalf of the Petitioners has submitted that the impugned orders are contrary to the law laid down by the Supreme Court in *Godrej and Boyce Manufacturing Company Limited vs. State of Maharashtra and Others*<sup>1</sup>. He invited our attention to paras 57 and 58 of the said judgment. He also relied on the judgment of the Apex Court in *The Municipal Corporation of Greater Bombay & Anr v. Yeshwant Jagannath Viaty & Ors*<sup>2</sup> (paras 15 & 17).

10. Mr. Milind Sathe, the learned Senior Counsel also appearing on behalf of the Petitioners relied on the judgment of the Apex Court in *Pune Municipal Corporation and Another vs. Promoters and Builders Association and Another*<sup>3</sup>. He submitted that in the said case, the Apex Court has observed that the Regulations framed under the Act have statutory force and, as such, Circulars issued by the Municipal Commissioner as an executive directions cannot override or supersede the provisions of Regulations.

11. On the other hand, Mr. Kumbhakoni, the learned Senior Counsel appearing on behalf of the Corporation submitted

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1 (2009) 5 SCC 24

2 AIR 2011 SC 1916

3 (2004) 10 SCC 796

that the Corporation had made an application to the State Government for amendment of the said relevant rules. He, however, candidly submitted that, yet, no decision has been taken by the State Government and Rules and Regulations are not amended.

12. After having heard both the learned Senior Counsels appearing on behalf of the Petitioners and the learned Senior Counsel appearing on behalf of the Corporation, we are of the view that the impugned orders which have been passed by the Corporation are clearly illegal. We are also fully in agreement with the submissions made by Mr. Milind Sathe, the learned Senior Counsel also appearing on behalf of the Petitioners that as observed by the Apex Court in *Pune Municipal Corporation*<sup>1</sup> the Regulations framed under the Act have statutory force and, as such, Circulars issued by the Municipal Commissioner as executive directions cannot override or supersede the provisions of Regulations.

13. The Apex Court in *Godrej and Boyce Manufacturing Company Limited*<sup>2</sup> (supra) has observed in paras 57 and 58 as under:-

“57. The last of the above makes the meaning of the word `equivalent' very clear

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1 (2004) 10 SCC 796

2 (2009) 5 SCC 24

by explaining it in contradistinction to the word 'equal'. It says equivalent is equal in such *properties* as affect the use which we make of things. Seen thus any of the relevant properties, e.g., value, area, volume, quantity, quality etc. may form the basis for determining equivalence. Now, if the words in paragraph 6 of the Schedule were to be "*equivalent to the construction/development*" then the submission of Mr. Naphade would have been fully acceptable as in that case it would be open to determine equivalence on the basis of value of the construction and not on any other basis. But the regulation fixes the measure of equivalence by using the words "equivalent to the *area* of construction/development done on the surrendered land". "*Area*" of construction/development having being fixed as the measure of equivalence it is no longer open to contend that any other basis such as value may be used for determining equivalence."

"58. We may here make it clear that we fully appreciate the rationale behind trying to make value of the development/construction rather than its area as the basis to recompense the land owner and for granting the additional FSI or TDR. The submissions of Mr. Naphade in that regard are not without substance but that is not the law as it stands and the value of the development/construction can only be made the basis for granting additional FSI or TDR by making suitable amendments in the law and not by an executive circular."

14. The Apex Court, thereafter, in another similar case in *The Municipal Corporation of Greater Bombay*<sup>1</sup> (supra), after relying on its judgment in *Godrej and Boyce Manufacturing Company Limited*<sup>2</sup>, has observed in paras 15 and 17 as under:-

“15.....The Court also noted the further argument that the Regulations framed under the Act had statutory force as held in *Pune Municipal Corporation v. Promoters and Builders Assn.* [2004 (10) SCC 796] : (AIR 2004 SC 3502). As against this, the circulars issued by the Municipal Commissioner were simply executive instructions and thus could not override or supersede the provisions of the Regulations. The Court also noted the argument that since the Municipal authorities were fully aware and conscious of this legal position, they had requested to the State Government to suitably modify Para 6 of Appendix VII of the Regulations. The non-retrospectivity of the circular dated 9.4.1996 was also noted.”

“17. In view of this unequivocal declaration of law by this Court in the aforementioned case of *Godrej and Boyce (cited supra)*, in fact, law seems to be fully settled against the Appellants. It is, however, argued that asphaltting of the courtyard could not be said to be an "amenity". The argument must fail as the very stance on the part of the MCGB to

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1 AIR 2011 SC 1916

2 (2009) 5 SCC 24

provide 15% of additional TDR for asphaltting the courtyard would contain an admission that asphaltting of the courtyard would amount to an amenity. Had it not been so, the MCGB could have conveniently said that it would not provide even 1% of additional TDR to the Respondents herein. Further, considering the definition of "amenity" under Regulation 3(7) of the Regulations, which includes open spaces, parks, recreational grounds, play grounds etc., we have no difficulty in holding that asphaltting the courtyard would certainly amount to an amenity. The building offered to be constructed by the Respondents herein was an export office. Considering the overall situation prevailing in Mumbai, the asphaltting of the whole courtyard and thus providing parking lot would certainly amount to an amenity. After all, the office, by its very nature, would attract trucks and other vehicles. In the absence of an asphalted large area, the office could possibly not be a feasible idea. On this count, the argument of the Appellants must fail.

15. The Apex Court, therefore, has not accepted in terms the submissions made by the learned Counsel appearing on behalf of the Corporation. In our view, ratio of the said judgments of the Apex Court would squarely apply to the facts of the present case and, as such, the impugned orders passed by Respondent No.3 will have to be quashed and set aside.

16. Writ Petitions are allowed in terms of prayer clauses (a) and (b). It is clarified that the Corporation shall give additional TDR as prayed for in terms of prayer clause (b) within six months from the date of this Order. Rule is made absolute accordingly.

**(K.R. SHRIRAM, J.)**

**(V.M. KANADE, J.)**



bdp