

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

...
WRIT PETITION NO.166 OF 1997
...

Mahendra J. Vora	...Petitioner
v/s.	
The Municipal Corporation of Gr.Bombay	...Respondents

WITH

WRIT PETITION NO.2370 OF 2006

Maharashtra Chamber of Housing Industry and ors.	..Petitioner
v/s.	
The Municipal Corporation of Gr.Bombay	..Respondents

WITH

WRIT PETITION NO.1262 OF 2010

Novel Properties Pvt.Ltd. and anr.	..Petitioner
v/s.	
The Municipal Corporation of Gr.Bombay	..Respondents

WITH

WRIT PETITION NO.718 OF 2010

M/s.Techno Realtors Pvt.Ltd.	..Petitioner
v/s.	
The Municipal Corporation of Gr.Bombay	..Respondents

...

Mr.E.P.Bharucha, Sr.Advocate a/w Mr.Shailesh Shah, Ms.Sonali S. Jain i/b M/s.Khona & Khyser for Petitioners in WP No.166/1997 & WP 2370/2006.

Dr.Milind Sathe with Dr.V.V.Tulzapurkar, Sr.Advocates with Ms.Hemlata Jain, Mr.Ranjit Shetty, Mr.Lucky Indurkar and Mr.Amit Iyer i/b Hariani & co. for Petitioner in WP No. 1262/2006.

Mr.A.V.Anturkar i/b Mr.S.B.Desmukh for Petitioner in WP No. 718/2010.

Dr.V.V.Tulzapurkar, Sr.Advocate i/b Ms.Yamin Bhansali & Co. for intervenor in WP No.2370 of 2006.

Mr.N.V.Walawalkar, Sr.Advocate with Mr.R.S.Apte, Sr.Advocate, Ms.Priti Purandare for Respondent BMC.

...

CORAM: D.K.Deshmukh &
N.D.Deshpande, JJ

DATED: 15th February,2011

P.C:

1. In all these petitions the Petitioners challenge the demand of premium made by the Corporation from the transferee of lease hold rights as also imposition of penalty for effecting transfer of lease hold rights, without obtaining

prior permission of the Corporation. The lands involved in all these petitions are owned by the Corporation. The lease of those lands has been granted by the Corporation. The question that arises for consideration in all these petitions is common. Therefore, these petitions can be conveniently disposed of by a common order.

2. Writ Petition No.166 of 1997 is filed by an individual. The subject matter of that petition is a plot of land admeasuring 700 yards with building thereon. The number of the plot is 731 at Dadar Matunga Estate of Bombay Municipal Corporation. By an Indenture of Lease dated 12th August, 1930 the said plot of land was granted by the Improvement Trust of City of Bombay, which is predecessor-in-title of the Bombay Municipal Corporation to Parsi Central Association Co-operative Housing Society Ltd. for a period of 999 years. This property was transferred by the original lessee to a charitable trust. The charitable trust transferred the lease hold rights in favour of the Petitioner after obtaining sanction which is required to be obtained under the provisions of the Bombay Public Trust Act from the Charity Commissioner. The Deed of

Assignment executed by the Charitable Trust in favour of the Petitioner is dated 1st August, 1995. After Assignment Deed was executed in favour of the Petitioner, the Petitioner applied to the Corporation for mutation of his name as lessee of the property in the record of the Corporation. The Petitioner received a communication from the Corporation dated 22nd February, 1996. The communication reads as under:-

With reference to your above cited letter, I have once again request you to obtain Index II from Sub-Registrar Office & submit certified true copy of the same. You are, further requested to pay the following amounts in to this office.

1. Rs.5,000/- as transfer fee
2. Rs.5,000/- as penalty for not obtaining prior permission from B.M.C. For transferring or assigning above plot.
3. Rs.154070/- as 7% of the total consideration amount mentioned in deed of assignment (I.e..22,01,000/-).

Further security deposit for breaches will be intimated to you in due course. You will have to pay the security deposit for the same or to rectify the breaches if you desire to process the matter further.

3. Thus, by above quoted communication the

Corporation demanded Rs.5,000/- as penalty for not obtaining prior permission of the Corporation before assigning the lease hold rights and Rs.1,54,070/- as premium. The Petitioner in this petition challenges these two demands. The case of the Petitioner is that the Corporation does not have any authority in law to demand this amount. According to the Petitioner, the Lease Deed also does not permit the Corporation to demand this amount. According to the Petitioner, relevant clause in the Lease Deed in this regard is clause (15). It reads as under:

15. Not to assign or transfer for the whole of the term hereby granted any portion of the demised premises apart from the whole and not at any time to charge or permit to be charged any premium whatever for the sub-demise of the whole or any part of the demised premises or any rents for the tenants on the demised land in excess of those time to time sanctioned by the Board pursuant to the Agreement dated the Ninth day of July One Thousand Nine Hundred and Twenty Nine and made between the Board of the one part and the Society of the other part.

4. According to the Petitioner, this clause does not require either the Petitioner or the lessee to obtain any prior permission of the Corporation before transferring the lease hold rights nor does it authorise the Corporation to claim

premium when the lease hold rights are transferred.

5. Writ Petition No.1262 of 2010 is filed by a company incorporated under the Companies Act. According to the Petitioner, perpetual lease of the land which is the subject matter of this petition was granted by the Corporation by Deed dated 27th July, 1955. The original lessee transferred/assigned the lease hold rights in favour of the Petitioner. The Petitioner applied for mutation of its name in the record of the Corporation as a Lessee. The Corporation was not effecting the mutation, therefore, Writ Petition No. 2594 of 1994 was filed in this Court. This court disposed of the petition by directing the Corporation to mutate the name of the Petitioner as a lessee keeping the question of entitlement of the Corporation to demand premium from the Petitioner open. The Corporation by communication dated 1st September, 2009 demanded from the Petitioner Rs.5000/- as penalty for not taking prior permission of the Corporation before effecting transfer and Rs.19,25,00,000/- towards premium. In this Petition also the case of the Petitioner is that

there is no authority in law for the Corporation to claim premium or penalty. The Petitioner claims that in fact the Lease Deed specifically makes the provision of Section 108(j) of the Transfer of Property Act applicable and therefore, transfer of the lease hold rights is permissible. The Petitioner relies on clauses 13 & 14 of the Lease Deed. They read as under:

13.“ So often as the said premises or any part thereof shall by assignment or transfer or by death or by operation of law or otherwise howsoever become assigned or transferred for the estate in perpetuity hereby granted to cause every deed or instrument of assignment or transfer and every Probate of a will or Letters of Administration Decree order certificate or other document effecting or evidencing the assignment or transfer to be left within a period of four calender months after the date of such document and for seven days at least at the office of the corporation for the purpose of registration in the Estate Registers of the Corporation PROVIDED ALWAYS that the time occupied in registering any document with the Sub Registrar of Assurances shall not be included in computing the period aforesaid and in case the Commissioner shall deem it necessary or advisable to take legal advice as to any such assignment or other document on demand to pay to the corporation all costs which the Commissioner may incur in and about the obtaining of such advice as aforesaid. “

“14. To indemnify and to keep indemnified

the corporation and the Commissioner or either of them against all claims demands suits decrees or Awards which may be made brought or passed against the corporation and the Commissioner or either of them in respect of any interference by the buildings erected for the time being upon the demised premises with any easements or amenities appertaining to the property of any person or persons adjoining or adjacent to the said demised premises.

PROVIDED ALWAYS AND IT IS HEREBY AGREED as follows:-

- (i) If and whenever there shall be a breach of any of the conditions or of the covenants on the part of the lessee herein contained, the Corporation may re-enter upon the said premises or any part of the said premises in the name of the whole and immediately thereupon this demise and all rights of the Lessees hereinafter shall absolutely determine.
- (ii) In all cases where the consent of the Commissioner or the City Engineer is required to any alteration of or addition to the buildings or other erections on the demised land or to any variation of user of any portion thereof such consent may be given upon the terms of payment by the Lessee of any fine or premium or otherwise as may be agreed between the parties.
- (iii) Any notice to be given to the Lessees under the terms of these presents or in connection with the demised land shall be considered as duly served if the same shall have been delivered to left for or posted addressed to the Lessees or the Agent of the Lessees or

any one of the persons (should such persons be more than one) to whom such notice should otherwise be given at the usual or last known place of residence or business in Bombay of the person served or on or at any part of the demised land or if the same shall have been affixed to any building or erection whether temporary or otherwise upon the demised land.

(iv) The following Rules mentioned in Section 108 of the Transfer of Property Act, 1882, shall not apply to the rights and liabilities under these presents of the Corporation and the Lessees respectively namely Rules (a), (b), (c), (f) (g), (h), (m), (o) and (p).

(v) Notwithstanding anything contained in Rule (j) of Section 108 of the Transfer of Property Adct, 1882 the said Frene Homi Boga, Rodabe Home Boga and Ernavag Homi Bora, the lastnamed being a minor by her father and natural guardian Homi Bora, upon any assignment or transfer of the demised premises being effected or happening (other than a transfer by way of sub-lease) and provided always that the conditions and the covenants in that behalf hereinbefore contained have been duly observed and performed by the Lessees shall cease to be subject to any of the liabilities attaching to the covenants on the part of the Lease hereinbefore contained and accruing after the date of such assignment or transfer.

6. Writ Petition No.2370 of 2006 is filed by the Maharashtra Chamber of Housing Industry in representative

capacity to claim that when in the Lease Deed executed by the Corporation granting lease of its land, there is no recital for the lessee to seek prior permission of the Corporation before effecting transfer of the lease hold rights, the Corporation cannot insist on the lessee or the transferee obtaining prior permission of the Corporation and cannot impose any fine for failure of the lessee or the transferee to secure such prior permission. It is also claimed that the Corporation cannot claim any premium when lessee of the Corporation transfers the lease hold rights of the land. In this petition, two petitioners are also joined, who are challenging following demands made by the Corporation from them:

(1) You are, therefore, requested to pay the following amounts of Rs.5,17,320.00 are as mentioned below:

- | | |
|-----------------|--|
| 1. Rs.25,520.00 | As security deposit with the outstanding breaches. |
| 2. Rs.26,000.00 | As a penalty for late submission of documents i.e. Deed of Assignment dt.20.11.1996, 20.11.1996, 20.11.1996 and 13.6.1994. |

3.Rs.17,500.00	Towards the legal advice charges u/no.LOP/4482 of 8.1.2004.
4.Rs.8,000.00	As a penalty for last submission of documents i.e. Probate of Will dt.16.04.1996.
5.Rs.1,32,650.00	As a 7% consideration amount of Rs.18,95,000/- for Deed of Assignment dt.20.11.1996.
6. Rs.69,300.00	As a 7% consideration amount of Rs.9,90,000/- for Deed of Assignment dt.20.11.1996.
7.Rs.1,13,400.00	As a 7% consideration amount of Rs.18,20,000/- for Deed of Assignment dt.20.11.1996
8.Rs.1,24,950.00	As a 7% consideration amount of Rs.17,85,000/- for Deed of Assignment dt.13.6.1994
<hr/>	
Rs.6,17,320.00	Total
<hr/>	

You are once again requested to submit the certified/notarized copy of Death Certificate of late Smt.Shailaja Shridhar Bandwadekar who died on 18.03.1984.

(2) “ With reference to above subject matter,you are hereby requested to pay the total amount of Rs. 23,18,730.00 into this office as detailed below:

1. 7% consideration amount as premium on agreement cost (Rs.3,29,89,000/-	.. Rs.23,09,230.00
2. Transfer fees	.. Rs.5000.00
3. Penalty for late submission of documents	.. Rs.1000.00
4. Legal advice charges	.. Rs. 3,500.00

TOTAL:	Rs.23,18,730.00
--------	-----------------

On receipt of the above payments, the transfer matter will be processed further which may please be noted.

The security deposit for breaches, if any, on the plot will be intimated to you in due course by taking fresh site inspection of the plot under reference.

7. Writ Petition No.718 of 2010 is filed by a company which is also a transferee of the lease hold rights in the land owned by the Corporation. On an application being made for making entry in the records of the Corporation reflecting the transfer, by communication dated 22nd January, 2010 the Corporation has demanded the premium. The relevant part of

the letter reads thus :

“Please refer to your letter dt. 21.06.2009 on the above subject matter. By Directions of D.M.C. (1)/A.M.C. (P) you are hereby informed that your request to consider the one transfer of lease in your case has been considered and the premium for transfer of lease at the rate of 50 % value of land as per R.R.rate will be recovered at once only for transfer of lease from original lessee to M/s Techno Realtors Pvt. Ltd and to would be Coop Hsg.Society of tenants and purchasers.”

8. Thus, in all these Petitions, what is challenged is the demand of premium for effecting mutation in the records of the Corporation of the transfer of lease hold rights and imposition of fine for not taking prior permission of the Corporation before assigning lease hold rights.

9. We have heard learned counsel appearing for the parties. We find that in none of the Lease Deeds with which we are concerned in these Petitions there is any provision for obtaining prior permission of the Corporation for effecting transfer of the Lease Deed. On the contrary, we find that in so far as the Lease Deed in Writ Petition No. 1262 of 2010 is

concerned, it specifically permits transfer of the lease hold rights. An affidavit has been filed by the Corporation only in one Petition and that affidavit shows that the Corporation has adopted the policy of the State Government of recovering unearned income on transfer of lease by claiming premium when the assignee of the lease hold rights applies for mutation of his name in the record. We find that this policy of the State Government has been considered by Division Bench of this court in the judgment in the case of Jaikumari Amarbahadursingh & ors vs.State of Maharashtra 2009 (1) ALL MR 343. The Division Bench has held that premium or unearned income cannot be recovered in the absence of any law authorising the Government to do so. What is observed in paragraph 19 of the judgment is relevant. It reads as under:

19. For the time being, we may safely proceed on the basis that as of now, there is no legislation enacted by the State Legislature which would govern the field of power to levy unearned income. We hasten to record this opinion after having analysed the relevant enactment and in particular the provisions of M.L.R.C. There is no express provision therein nor it is possible to suggest that the State Legislature purports to do so by implication. The learned Counsel for the State is

unable to substantiate with reference to any specific provision of M.L.R.C. which would suggest to the contrary. Indeed, the statutory rules framed under the MLRC, titled as the Maharashtra Land Revenue (Disbursal of Government Lands) Rules, 1971, carve out exception about existence of such authority in relation to grant of land for industrial and commercial purposes. That position is spelt out from clause (c) of sub-rule (2) of Rule 31 read with Rules 35 and 41 of the said Rules. There is no corresponding provision enabling the State Government to claim or levy unearned income in respect of grant of land for Agricultural use under Part III or residential use under Part IV of the said Rules. Besides, going by the provisions of the said Rules it would apply to fresh grants in respect of unoccupied lands. In other words, the State Government as of now has no authority to levy unearned income in respect of lands in question under whatever title, which would obviously include lands held by occupants-Class I. In absence of a specific law on this subject, the State Government or its Officers cannot usurp to itself power to levy such charges on the basis of a Government Resolution. That power to levy unearned income can be invested in the State Government only if the State Legislature expressly or by implication authorises it to do so and not otherwise. By no means such power can be usurped by an Executive fiat in the form of a Government Resolution. Suffice it to observe that a Government Resolution cannot be substitute for a "law" to be enacted by the competent legislature-so as to affect the unconditional right of the Grantees to transfer and inherit the property. Till such law is enacted, the State Government and its Officers are bound to honour the commitment in the Lease Deed if already executed and in any case, give effect to the extant provisions of law. To that extent, the Resolution will have to be held as

inconsistent with the Scheme of MLRC and the Rules framed thereunder; In particular, with reference to grant of land other than for commercial or industrial purpose. In that, insofar as grant of land for commercial and industrial purposes, there is express provision in the Rule 31(2)(c) enabling the State Government to claim half the unearned income where the land is sold without any construction. We are not called upon to consider the validity of that provision.

10. The Division Bench in the case of Jaikumari has further held that when lease of the land is granted during the currency of that lease no new condition can be added in the Lease Deed unilaterally by one of the party. Thus, the State Government's policy of recovering unearned income without there being any law authorising the State Government to do so and in the absence of any provision in the Lease Deed authorising the State Government to recover unearned income has been held to be invalid by the Division Bench of this Court.

11. The learned Counsel appearing for the Petitioners relied on the judgment of the Supreme Court in the case of Ahmedabad Urban Development Authority v/s. Sharadkumar

Jayantikumar Pasawalla and ors, (1992) 3 SCC 285 to contend that unless there is a power conferred by the Legislature, premium cannot be claimed by the Corporation from assignee of the lessee. We find that what is observed by the Supreme Court in paragraphs 7 & 8 of that judgment is relevant. It reads as under:

7. After giving our anxious consideration to the contentions raised by Mr. Goswami, it appears to us that in a fiscal matter it will not be proper to hold that even in the absence of express provision, a delegated authority can impose tax or fee. In our view, such power of imposition of tax and/or fee by delegated authority must be very specific and there is no scope of implied authority for imposition of such tax or fee. It appears to us that the delegated authority must act strictly within the parameters of the authority delegated to it under Act and it will not be proper to bring the theory of implied intent or the concept of incidental and ancillary power in the matter of exercise of fiscal power. The facts and circumstances in the case of District Council of Jowai are entirely different. The exercise of powers by the Autonomous Jaintia Hills Districts are controlled by the constitutional provisions and in the special facts of the case, this Court has indicated that the realisation of just fee for the a specific purpose by the autonomous District was justified and such power was implied. The said decision cannot be made applicable in the facts of this case or the same should not be held to have laid down any legal proposition that in matters of

imposition of tax or fees, the question of necessary intendment may be looked into when there is no express provision for imposition of fee or tax. The other decision in Khargram Panchayat Samiti's case also deal with the exercise of incidental and consequential power in the field of administrative law and the same does not deal with the power of imposing tax and fee.

8. The High Court has referred to the decisions of this Court in Hingir's case, and Jagannath Ramanuj's case and Delhi Municipal Corporation's case (supra). It has been consistently held by this Court that whenever there is compulsory exaction of any money, there should be specific provision for the same and there is no room for intendment. Nothing is to be read and nothing is to be implied and one should look fairly to the language used. We are, therefore, unable to accept the contention of Mr. Goswami. Accordingly, there is no occasion to interfere with the impugned decision of the High Court. The appeal, therefore, fails and is dismissed with no order as to costs.

12. The Supreme Court has thus held that whenever there is compulsory exaction of money, there should be specific provision for the same. In the present case, we have not been pointed out any provision permitting the Corporation to recover premium from the assignee of lease. We have also not been pointed out any recital in the Lease Deed permitting the Corporation to do so. Therefore, the Corporation

obviously was not entitled to claim premium for taking entry about assignment of the lease hold rights. We also found that neither there is any provision in any law nor there is any term in the Lease Deed with which we are concerned in these petitions requiring the lessee to seek prior permission of the Corporation before assigning his lease hold rights. As prior permission itself is not contemplated, there is no question of the Corporation levying any penalty for assigning the lease hold rights without prior permission of the Corporation. The demand made by the Corporation in that regard, therefore, is without authority of law.

13. In these circumstances, therefore in our opinion, all these Petitions will have to be allowed. They are accordingly allowed. It is held that in the absence of any stipulation in the Lease Deed permitting the Corporation to charge any premium or any provision in law authorizing the Corporation to claim such a premium on transfer of lease hold rights, the Corporation cannot claim any premium like it has been done in this case from the assignee. Similarly in the

absence of any stipulation in the Lease Deed for not obtaining prior permission of the Corporation for assignment of lease hold rights the Corporation cannot demand any transfer fees from the assignee. The amount that might have been collected by the Corporation pursuant to the demand notice which has been made in these Petitions are directed to be refunded by the Corporation after adjusting any legal demands that may be due to the Corporation from the Petitioners within a period of eight weeks from today.

14. In Writ Petition No. 166 of 1997 there is an interim order for refund of the amount paid by the Petitioner with interest at 10 %. The Corporation shall comply with that order.

Rule made absolute accordingly.

(D.K.DESHMUKH, J.)

(N.D.DESHPANDE, J.)

