



Jus Corpus Law Journal

Open Access Law Journal – Copyright © 2024 – ISSN 2582-7820
Editor-in-Chief – Prof. (Dr.) Rhishikesh Dave; Publisher – Ayush Pandey

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Case Comment: Judicial Clarity and Government Support: Easing Real Estate Developers' Burdens in Maharashtra - Prestige Real Estate Ltd v State of Maharashtra & Ors & Connected Matters

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Received 10 May 2024; Accepted 11 June 2024; Published 15 June 2024

INTRODUCTION

The present case arises out of the complaints of nine reputed real estate developers of Mumbai seeking a single relief i.e. *'What the State Government giveth, the Municipal Government taketh away.'* The entire country had come to a standstill ceasing operation across industries when the nation was hit by the COVID-19 Pandemic. The Hon'ble Prime Minister of the country announced a complete lockdown on 25.03.2020 with stringent measures in place to curb the coronavirus. The construction industry was no stranger to this. All operations whether commercial, residential, or government projects had to be halted completely. A large part of the workers were forced to return to their villages owing to the stoppage of work and widespread restrictions. The construction industry which operated majorly on the rotation of money was in the doldrums owing to the bleeding cash flows and lapsing permissions due to the imposed lockdown. Amidst these tensions, real estate developers were faced with additional hardships of having to renew the IoD (intimation of disapproval) given to them as they held a validity of only one year.

Developers who were looking to purchase additional FSI (floor space index) were burdened with the payment of exorbitant premiums on these purchases. The State Government created a committee under the leadership of the industrialist Mr. Deepak Parekh which afforded developers a substantial rebate in the premium that they otherwise have to pay for acquiring Additional FSI, subject to fulfillment of certain conditions. However, the developers had to run from one office to another of the MCGM for the revalidation of the IoD, where to much surprise they were asked to pay the premium as per the next year's non-concessional Annual Standard Rates, albeit, they were offered an adjustment of the amounts previously paid. Through the case of **Prestige Estate Projects Ltd v State of Maharashtra & Ors & Connected Matters**¹, we delve deeper into the intricacies of the different permissions required to be sought by real estate developers and how the Hon'ble Bombay High Court came to the aid of these developers and flat purchasers.

KEY TERMINOLOGIES

Before delving deeper into the facts and circumstances of the case in hand, it is essential to enhance our knowledge of the different terms we would be dealing with in the later part of this case commentary like IoD, CC, FSI, Additional FSI, Premium FSI, DCPR, GR.

IoD or Intimation of Disapproval – Intimation of Disapproval granted under Section 346 of the Mumbai Municipal Corporation Act, 1888². It is an approval given by the Municipal Corporation to the developer wherein the developer is required to meet a number of requirements and acquire various approvals and clearances from different authorities. An Intimation of Disapproval is always granted in the negative and has a validity of one year.

CC or Commencement Certificate – The Commencement Certificate is granted under Section 45 of the Maharashtra Regional and Town Planning Act, 1966³. The Commencement Certificate is the next crucial approval given by the Town Planning Authorities on the submission of the NOCs, sanctions, and clearances. It is only after the issuance of a commencement certificate that

¹ *Prestige Estate Projects Ltd v State of Maharashtra & Ors & Connected Matters* WP (L) No 17993/2023

² Mumbai Municipal Corporation Act 1888, s 346

³ Maharashtra Regional and Town Planning 1966, s 45

a developer can start the construction of the project. The Commencement Certificate has a validity of three years.

FSI or Floor Space Index – Floor Space Index is a fundamental concept in real estate. It is referred to as the maximum permissible area allowed to a builder to construct on a parcel of land. It is the ratio of the built-up area of a building to the total land area. In Mumbai, the FSI is 1 and as we move to the suburbs it becomes 1.33. A builder must do any construction keeping in mind the prevailing FSI.

Additional/Fungible FSI – Additional/Fungible FSI allows developers to build additional floors over and above the built-up area by paying an extra premium calculated on the basis of the ready reckoner rates prevalent in that area. This helps builders and developers to maximize the available space without violating the prescribed FSI limit. The access to additional FSI and the applicable premium payable are linked to the width of the nearby road.

FACTS OF THE CASE

The present judgment covers nine different writ petitions filed by nine reputed real estate developers consisting of Prestige Estate, Sugee Two, Sugee Nine, Sugee Fifteen, Ankur Premises, Relcon Infraprojects, Mayfair Housing, and Evershine Builders. Given that there are nine different petitions filed under Article 226 of the Constitution of India⁴, it wouldn't be feasible to delve deeper into the peculiar facts of each case. Therefore, we would look into the common facts which have been covered in all these nine petitions and the blanket order passed covering each of these developers. The Petitions were filed in light of the report filed by the Deepak Parekh committee⁵ which sought to revive the hard-hit construction owing to the coronavirus pandemic. The report highlighted how the premiums and demands payable to the government were 13 times more expensive in Mumbai as compared to Delhi and that it stood at 34 times for commercial real estate projects. It also highlighted the fact that the premium payable to the Government constituted 33% of the sale price of the project, thereby needing a substantial

⁴ Constitution of India 1950, art 226

⁵ Maharashtra Chamber of Housing Industry, *CREDAI-MCHI Report on MMR Housing Uptick Aided by Support* (2022)

reduction in the same⁶. On 14th January 2021, the State Government came out with a Government Resolution under Section 154 of the MRTP Act⁷ which includes various clauses of utmost importance with respect to the present case. It is important to reproduce the clauses for better understanding.

- 1. It allowed for a 50% rebate in respect of premium to be charged for additional FSI in the area of the Planning authority namely the MCGM as well as the Regional Schemes.*
- 2. Clause A dealt with the eligibility criteria and set out the projects eligible for the scheme. It set the deadline for the deposit of the premium to 31st December 2021. Additionally, the concession applies to premiums under the Developmental Control and Promotional Regulations (DCPR).*
- 3. Clause B states that any project that wishes to avail of this rebate must pay the entire stamp duty of persons taking p houses, flats, or units in economically weaker sections, lower-income groups, middle-income groups and higher-income group categories. The developers had to adhere to the following requisites as mentioned herein below.*
- 4. The developers must give an undertaking that they will absorb 100% of the stamp duty, a certificate of beneficiary customer must be submitted to the Planning Authority, the developer must publish a list of purchasers for whom the stamp duty has been paid, a list of participating projects is to be sent to the stamp registration office and lastly, the projects that take the benefit of this concession must continue the benefit of stamp duty until the constructed area for which the benefit has been taken is sold.*
- 5. Clause C states that the annual statement of rates to be considered as a base for charging the premium for new power projects or part of the projects should be that which is applicable on the 1st of April 2020 or that which is prevalent while depositing the premium, whichever is higher.*

Following the Government Resolution dated 14.01.2022, several discussions between the State Government and the Municipal Corporation of Greater Mumbai (MCGM) ensued, with a focus

⁶ Nauzer Bharucha, 'Developers in Mumbai pay average Rs 54,221 per square meter as approval costs to authorities' *The Times of India* (29 September 2023)

<<https://timesofindia.indiatimes.com/city/mumbai/developers-in-mumbai-pay-average-rs-54221-per-square-meter-as-approval-costs-to-authorities/articleshow/104019439.cms>> accessed 30 April 2024

⁷ Maharashtra Regional and Town Planning Act 1966, s 154

on seeking clarifications regarding various issues. In February 2021, talks centred on premium payments in instalments, leading to the issuance of a circular by MCGM on February 22, 2021, outlining modalities for availing a 50% rebate on premiums. Subsequently, MCGM's Chief Engineer raised concerns on November 23, 2022, regarding reissuing lapsed Intimations of Disapproval (IoDs) without additional premiums, a matter further emphasized in a formal request to the Urban Development Department on November 30, 2022. However, the Government responded on December 23, 2022, maintaining the IoD's one-year validity under the Mumbai Municipal Corporation (MMC) Act, signalling no immediate need for further clarification. These exchanges navigated through premium payment processes, rebate conditions, and IoD validity, all aimed at facilitating construction activities amidst the challenges posed by the pandemic.

Persistently, the Chief Engineer wrote to the Under Secretary, Urban Development Department, noting representations from the Practicing Engineers Architects and Town Planners Association (PEATA) and a Member of Parliament regarding hardships faced by project proponents in obtaining commencement certificates (CC). These hardships included non-compliance with IoD conditions, non-cooperation of society members in redevelopment projects, delays in evacuating existing buildings, and delays in obtaining NOCs from various authorities. The letter highlighted that IoDs with concessional premiums had been granted to some proposals, but some project proponents couldn't apply for CC within the IoD validity period due to various reasons. The letter requested concurrence to reissue IoDs for projects that availed 50% premium concessions, where premiums were paid as per government directives and there were no changes in the original approval, extending the concession until December 31, 2023.

In response to the aforementioned letter, on June 8, 2023, the State Government stated that extending the validity of the IoD fell under the jurisdiction of the corporation as it constituted an administrative function, not falling within the purview of the Government Resolution (GR) dated January 14, 2021. Consequently, the State Government expressed a lack of necessity for clarification on their part, suggesting instead that a proposal should be submitted to the corporation regarding the need for such concurrence.

LEGAL ISSUES

1. Whether the Government Resolution (GR) provided for a one-time rebate on premium for additional FSI or if it could be utilized by developers year after year.
2. Whether lapsed Intimations of Disapproval (IoDs) can be revalidated without payment of premium, particularly for those who benefited under the GR.
3. Whether developers are obligated to bear the stamp duty liability until the completion of the project, as mandated by the GR.
4. Whether the requirements of the GR can be harmonized with relevant statutory provisions, particularly Section 347.

OBSERVATIONS

Primarily, the Court explored the statutory provisions revolving around the issues at hand. The court closely examined the statutory provisions cited by Mr. Chinoy (Id. Sr. Advocate on behalf of MCGM), placing particular emphasis on Section 347(2) of the MRTP Act⁸. This provision, *allowing for the issuance of a fresh notice after the lapse of an Intimation of Disapproval (IoD)*, was deemed crucial by the court. It underscored the significance of treating the fresh notice as if it were a first notice, thereby resetting the entire process. The court's interpretation of 'commencement of work' aligned with Mr. Chinoy's argument, clarifying that *it necessitates the issuance of a Commencement Certificate (CC) under Section 45 of the MRTP Act*. Additionally, the court delved into the provisions of the Development Control and Promotion Regulations 2034 (DCPR 2034), specifically DCR 30⁹ and DCR 30(6)¹⁰, the first regulation of the DCPR 2023 in Part V, *notably discussing premium payment for additional Floor Space Index (FSI)*. It *reaffirmed the optional nature of utilizing additional FSI and emphasized that the additional premium ought to be used in the original plot unlike Transferable Developmental Rights (TDR)*. A similar reading was given by the division bench of the Supreme Court where it opined that Section 48¹¹ stipulates that

⁸ Maharashtra Regional and Town Planning Act 1966, s 347(2)

⁹ Development Control Regulation, reg 30

¹⁰ Development Control Regulation, reg 30(6)

¹¹ Maharashtra Regional and Town Planning Act 1966, s 48

development permission remains valid for one year, extendable up to three years, but if construction is not completed within this time frame, fresh permission is required. However, the second proviso exempts applicants from seeking new permission if construction reaches the plinth level or equivalent within four years¹².

The court scrutinized whether the additional Floor Space Index (FSI) constitutes 'property' or 'an entitlement'. Dr. Chandrachud (**Id. Advocate for the Petitioner**) argued that once the premium is paid, the additional FSI becomes property, akin to any other tangible asset. Mr. Chinoy countered, highlighting that additional FSI is not marketable or tradable and can only be used on the specific plot of land. The court sided with Mr. Chinoy, emphasizing that additional FSI is an entitlement subject to a fee, not qualifying as property. The court rejected the argument that denying renewal of Intimation of Disapproval (IoD) and additional FSI constitutes expropriation without compensation, noting that additional FSI is a permission for increased built-up area, not a property right. The court underscored the discretionary nature of concessions by the Municipal Corporation of Greater Mumbai (MCGM), rejecting Dr. Chandrachud's argument.

Moreover, it addressed the notion of the 'bankability' of the additional Floor Space Index (FSI), emphasizing its link to the Intimation of Disapproval (IoD). The court highlighted the logical inconsistency in the notion of obtaining additional FSI at a later stage after obtaining an IoD. The court reasoned that if an IoD is obtained, work must commence within its lifespan, necessitating the acquisition of a Commencement Certificate (CC). Since there is no inherent right to later amend plans to include additional FSI, the court concluded that any application for additional FSI must coincide with the initial proposal submission. Essentially, the court emphasized that obtaining additional FSI later contradicts the procedural requirements and principles governing the issuance of IoDs and CCs. Dr. Sathe (**Id. Sr. Advocate for Prestige Real Estate/Petitioner**) argued that additional FSI could be obtained at any time, independent of the IoD, suggesting a form of 'hoarding'. However, the court rejected this argument, stating that additional FSI cannot be obtained without an IoD. Allowing developers to obtain additional FSI

¹² *Shree Ram Urban Infrastructure Ltd. & Ors v State of Maharashtra & Ors* MANU/SC/1465/2019 [40]

without an IoD would lead to hoarding and evasion of increased premiums. Therefore, the court concluded that the bankability of additional FSI cannot be de-linked from the IoD.

The court rightly observed that the Government resolution was intended to revitalize the struggling real estate sector and alleviate the financial burden on flat purchasers facing exorbitant rates. It noted that the resolution provided relief by reducing premiums for developers while also shouldering the entire stamp duty burden for consumers, thereby easing the financial strain on both parties. It further emphasized that the issuance of a valid Intimation of Disapproval (IoD) is a prerequisite for commencing construction work. Without obtaining a Commencement Certificate (CC), no construction activity can begin, thus rendering the utilization of the Floor Space Index (FSI) impossible. Consequently, the court asserted that part of the IoD terms mandates the payment of the differential premium for additional FSI each time the IoD is sought to be revalidated. This premium is calculated based on a percentage of the Annual Statement of Rates (ASR) prevailing at the time of IoD issuance. *For instance, if the ASR in the first year is Rs 100 with a 10% premium rate, then the premium payable would be Rs 10. Subsequently, if the IoD lapses and needs revalidation in the following year with an ASR of Rs 150, maintaining the same 10% premium rate, the developer would owe Rs 15, with credit for the Rs 10 previously paid, requiring an additional payment of Rs 5 to cover the differential.*

Subsequently, the court highlighted the various hurdles developers face in obtaining regulatory approvals. These challenges include delays caused by objections raised by society members or claimants, as well as decisions by officials to withhold or delay the issuance of necessary No Objection Certificates (NOCs). Such impediments often force developers to bear the financial burden of the differential premium in the following year.

DECISION

In its ruling, the court highlighted Clause V of the Government Resolution (GR), emphasizing the crucial requirement for developers to continue bearing the burden of stamp duty until the completion of the project or the sale of the designated area. This clause underscored the GR's intent, which not only granted concessions but also imposed corresponding obligations on

developers. The court stressed that developers, having committed to bearing the stamp duty burden, were bound by this obligation until project completion, as outlined in the GR conditions.

The court emphasized the one-off nature of the rebate provided by the GR, applicable within a limited timeframe and specific circumstances. It emphasized that the rebate scheme necessitated developers to fully assume the stamp duty liability, a commitment enshrined in the GR conditions. The court reasoned those once developers availed themselves of the benefits under the GR, they were obligated to continue adhering to its conditions until project completion.

The court addressed the contention surrounding the revalidation of lapsed Intimations of Disapproval (IoDs) vis-à-vis premium payments. By scrutinizing the interplay between the GR and pertinent statutory provisions, notably Section 347¹³, the court discerned a pathway to harmonize these seemingly discordant elements. It ruled that IoDs could be revalidated sans additional premium payments, provided developers fulfilled the conditions delineated within the GR, thus striking a delicate balance between regulatory compliance and equitable relief.

Furthermore, the court took into account the communication issued by the Maharashtra Government, firmly asserting that the validity of the Government Resolution (GR) endured until its stipulated expiry date. It clarified that only projects that had availed of the benefits during the GR's effective period and adhered to the requirements outlined from Clause B-I to B-V would qualify for exemption from additional payments for IoD and CC renewals. Consequently, the Municipal Corporation of Greater Mumbai (MCGM) was instructed to revalidate IoDs without imposing supplementary premiums and issue refunds to those who had paid the differential payments, although party to the rebate scheme.

CASE ANALYSIS

The present judgment provided much-needed clarity and guidance on the implementation of the Government Resolution dated 14.01.2021 in Maharashtra's Real Estate sector, the issuance of this government resolution was a direct outcome of the recommendations put forth by the committee chaired by Deepak Parekh. The resolution aimed to revitalize the cash-strapped real

¹³ Mumbai Municipal Corporation Act 1888, s 347

estate sector by addressing soaring property and permission rates. It served as a much-needed respite for developers who were struggling to revalidate their IoD and CC without bearing the additional premiums demanded by the MCGM. The Division Bench of the Hon'ble Bombay High Court provided the definitive interpretation of the Government Resolution dated 14.01.21, emphasizing that real estate developers could avail themselves of a 50% rebate in premium payments. However, this benefit was contingent upon the developers bearing the entire stamp duty burden of the purchasers until the property was sold off, ensuring its persistence till the project's completion. Notably, this benefit was available only to those builders who had availed of it within the stipulated time frame. The case further delved deeper into the significance of a valid IoD in the real estate development process. It underscores how a valid IoD is a prerequisite for obtaining a Commencement Certificate, the cornerstone of starting a construction project. The judgment recognized that IoDs could get lapsed due to various reasons beyond the control of the developers, significantly impeding the progress of real estate projects. The court interpreted the Government Resolution in a holistic manner considering the practical implications of its provisions, ensuring transparency and fairness in the treatment of flat purchasers and developers. Additionally, the judgment also directed a refund to all those real estate developers who had paid the differential amount despite being beneficiaries under the rebate scheme, providing both clarity and financial relief. Last year, the Urban Development Department in Mumbai extended the installment facility for premiums payable under various regulations to state agencies for three years. This decision was prompted by the challenges encountered by developers, who face over 32 different premiums payable to various government agencies, thus making homes unaffordable and deterring investments¹⁴. Courts and state governments are increasingly acknowledging the challenges encountered by builders, as evidenced by recent decisions granting extensions and installment facilities for premium payments, aiming to alleviate burdens on developers amidst regulatory complexities.

¹⁴ Yogesh Naik and Satish Nandgaonkar, 'Govt extends instalment facility on premiums payments' *Hindustan Times* (04 May 2023) <<https://www.hindustantimes.com/cities/mumbai-news/mumbai-grants-developers-3-year-instalment-facility-extension-for-premiums-payable-under-development-control-promotion-regulations-2024-101683139768439.html>> accessed 25 April 2024

CONCLUSION

The present judgment reinstated real estate developers' confidence in the Indian Judiciary by demonstrating that they could seek recourse in the High Court when faced with varying interpretations of a government resolution. Moreover, by acknowledging the report of the committee led by Mr. Deepak Parekh, the judgment underscored the importance of evidence-based policymaking in addressing economic challenges. The judges provided a definitive interpretation of the clauses within the Government Resolution, which had previously been subject to varying interpretations by different MCGM officers, resulting in requests for differential payments for renewal permissions. It played out like a game of Chinese whispers, where each officer offered their unique interpretation to the GR. In addition to offering much-needed clarity, the judgment went a step further by mandating refunds for those who had inadvertently paid the differential premium despite being entitled to benefits under the scheme. It not only upheld but also adeptly deciphered the underlying purpose behind the issuance of the Government Resolution, ensuring its alignment with pertinent legislative acts. By doing so, the judgment not only resolved the immediate issue at hand but also set a precedent for future interpretations, cementing its significance in the legal landscape.